(28,923)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 385.

ST. JOHNS N. F. SHIPPING CORPORATION, OWNER, &c., PETITIONER,

vs.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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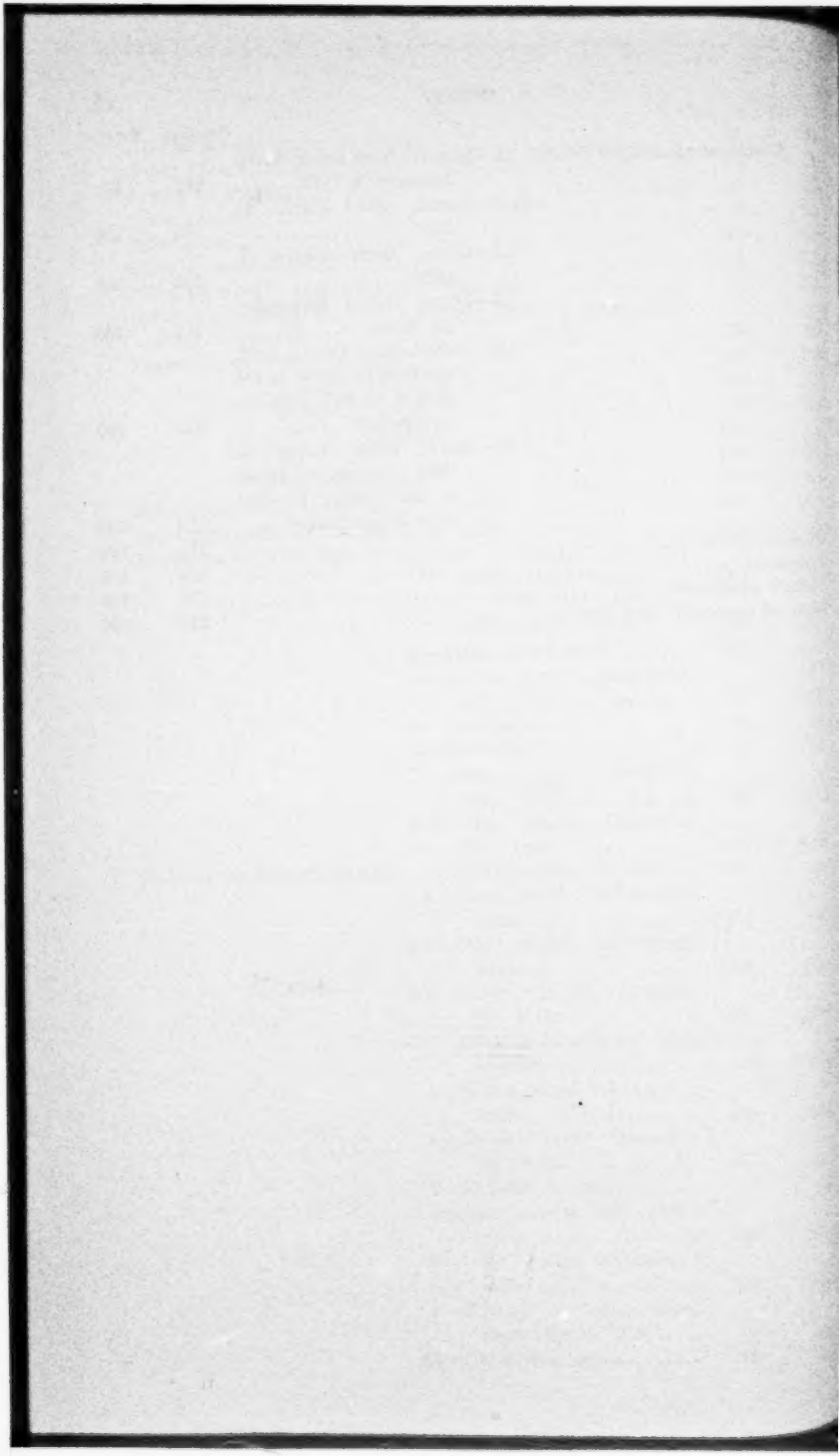

1 United States District Court, Southern District of New York.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

Statement.

1919:

May 17.—Libel filed.
June 26.—Answer filed.
November 19.—Exceptions to answer filed.
December 5.—Exceptions sustained on condition, etc.—End., Mayer, J.
December 9.—Amended answer filed.
December 9.—Interlocutory decree and order of reference entered.

1920:

February 7.—Offer of damages filed.
September 28.—Commissioner's report and exhibits filed.
September 30.—Exceptions to report filed.
October 8.—Exceptions to report overruled by Mack, J.
October 13.—Final decree entered.
October 27.—Notice of appeal filed.
November 6.—Assignments of error filed.

2 *Libel.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of S. A. Companhia Geral Commercial do Rio de Janeiro against the Schooner "St. John's, N. F.," her tackle, etc., and all persons intervening for their interest therein, in a cause of contract, civil and maritime, alleges, upon information and belief, as follows:

First. That at all the times hereinafter mentioned the S. A. Companhia Geral Commercial do Rio de Janeiro was and is a foreign corporation, organized and existing under and by virtue of the laws of the Republic of Brazil.

Second. That the Schooner "St. John's, N. F.," is an American vessel, and is now, or soon will be within the Port of New York, and within the jurisdiction of this Honorable Court.

Third. That on or about June 12th, 1918, The General Commercial Company, Ltd., of United States, shipped and delivered to

the said Schooner "St. John's, N. F.," then lying in the Port of New York, and bound from the said port to Rio de Janeiro, 800 barrels of rosin, in good order and condition, to be transported by the said Schooner "St. John's, N. F." to the Port of Rio de Janeiro and there delivered, in like good order and condition, to the libelant, freight prepaid, according to the terms and conditions of a certain Bill of Lading then and there delivered to the shippers by the agents for the said schooner, a copy of which Bill of Lading is hereto attached and made a part hereof as Schedule "A."

3 Fourth. Thereafter and before the departure of the said schooner from the Port of New York with the said cargo on board the said The General Commercial Company, Ltd., of United States, duly endorsed the said Bill of Lading and delivered the same to the libelant or its agents or representatives, who, at the time of the departure of the said Schooner "St. John's, N. F.," with the said cargo of rosin, were the holders of the said Bill of Lading, and were the owners of the said shipment of rosin and entitled to the delivery thereof, in accordance with the terms and conditions of the said Bill of Lading and agreement hereinabove set forth.

Fifth. That on or about June 12th, 1918, the Schooner "St. John's, N. F.," hereinabove referred to, sailed from the Port of New York on its voyage to Rio de Janeiro with the libelant's shipment of rosin, hereinabove mentioned, on board.

Sixth. That in due course, on or about August 26th, 1918, the said Schooner "St. John's, N. F.," duly arrived at its destination at the Port of Rio de Janeiro, but wholly failed to deliver to the libelant its said shipment of rosin, hereinabove referred to, or any part thereof, in accordance with the terms and conditions of the Bill of Lading and agreement herein mentioned, although the same was duly demanded.

Seventh. That the loss of the said shipment was due to the fault and negligence of the said Schooner "St. John's, N. F.," in respect to the loading, stowage, custody and care of the said shipment.

Eighth. By reason of the failure of the said Schooner "St. John's, N. F.," to deliver the aforesaid shipment of 800 barrels of
4 rosin, libelant has sustained damage in the sum of Twenty-three thousand two hundred Dollars ($23,200), which amount has been duly demanded of the owners of the said schooner and payment of the whole, or any part thereof, has been refused.

Ninth. That all and singular the premises are true and within the Admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that process in due form of law, according to the course and practice of this Honorable Court, may issue against the said Schooner "St. John's, N. F.," her tackle, equipment, etc., and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that

this Honorable Court may be pleased to decree to the libelant payment of its damages, as aforesaid, with interest and costs, and that the said schooner, her tackle, equipment, etc., may be condemned and sold to pay the same, and that the libelant may have such other and further relief in the premises as it may be entitled to receive.

HAYS, KAUFMAN & LINDHEIM,
CROWELL & ROUSE,
Proctors for Libelant.

5 STATE OF NEW YORK,
County of New York, ss:

Arthur Garfield Hays, being duly sworn, says that he is one of the proctors for the libelant herein; that the foregoing libel is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the source of his information and the reason for his belief as to the matters not within his own knowledge are communications had from the libelant and its representatives.

That the reason why this verification is not made by the defendant itself is that it is a corporation, and the reason that it is not made by one of its executive officers is that none of them is within this District.

ARTHUR GARFIELD HAYS.

Sworn to before me this 9th day of May, 1919.

J. JOHN SCHULMAN,
Notary Public, New York County, No. 511.

New York County Register's No. 1522.
Certificate filed Kings County No. 95.
Kings County Register's No. 1197.

SCHEDULE A ANNEXED TO LIBEL.

Identical with exhibit, bill of lading, filed with Commissioner's report, and printed in full herein at Page 25.

6 *Amended Answer.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The amended answer of St. John's, N. F., Shipping Corporation, owner of the Schooner St. John's, N. F., to the libel of S. A. Companhia Geral Commercial Do Rio de Janeiro, in a cause of contract, civil and maritime, alleges upon information and belief as follows:

First. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the First Article of the libel.

Second. It admits the allegations of the Second Article of the libel.

Third. It admits that some time in June, 1918, General Commercial Company, Ltd., of United States, delivered to the Schooner St. John's, N. F., then lying in the port of New York, bound for the Port of Rio de Janeiro, 800 barrels said to contain rosin, to be transported by said schooner to the Port of Rio de Janeiro, and there delivered in the same condition as when received unto S. A. Companhia Geral Commercia. It admits that the freight on said cargo was prepaid and that a bill of lading acknowledging receipt of said cargo was issued. It believes that the photographic copy of bill of lading annexed to the libel is a copy of the bill of lading issued upon receipt of said cargo, but for greater accuracy, begs leave to refer to the original or true copy thereof at the trial hereof. It denies that it has any knowledge or information sufficient to form a belief as to the condition of said cargo when received on board said
7 schooner. It denies the other matters alleged in the Third Article of the libel.

Fourth. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the Fourth Article of the libel.

Fifth. It admits the allegation of the Fifth Article of the libel.

Sixth. It admits, as alleged in the Sixth Article of the libel, that in due course, on or about August 26th, 1918, the Schooner St. John's, N. F., duly arrived at the Port of Rio de Janeiro, and that it did not deliver to the libelant the shipment, or any part thereof.

Seventh. It denies the allegations of the Seventh Article of the libel.

Eighth. It denies any knowledge or information sufficient to form a belief as to allegations of the Eighth Article of the libel, except that it admits the demand and refusal to pay.

Ninth. It denies that all and singular the premises are true, as alleged in the Ninth Article of the libel, but admits that the premises are within the Admiralty and Maritime jurisdiction of this Honorable Court.

Further answering the libel, the claimant alleges on information and belief:

Tenth. On or about June 6, 1918, W. S. Job & Co., Inc., as agents for the Schooner St. John's, N. F., entered into a written contract with General Commercial Co., Ltd., of the United States,
8 through its agents, to carry on board the Schooner St. John's, N. F., then lying at the Port of New York, 800 barrels Rosin, on or under deck, ship's option, to the Port of Rio de Janeiro, at the agreed freight of $30.00, net per 2,240 lbs. prepaid. A copy of said contract of affreightment is annexed hereto, marked Schedule A, and made part of this amended answer. Thereafter said 800 barrels were properly and securely loaded on the deck of the Schooner St. John's, N. F., being lashed down and boxed in and planked, and on or about June 19, 1918, the vessel, being properly manned and equipped, and

seaworthy in all respects, sailed for the Port of Rio de Janeiro, carrying said 800 barrels on deck and a general cargo under deck, all of which was within the knowledge of the shippers.

Eleventh. On the voyage to Rio de Janeiro all went well until June 22nd, when the Schooner St. John's, N. F., then being in latitude 39 north, longitude 68 west, encountered a severe gale from the southeast. At 7 a. m. on that day the wind changed from south-southeast to southwest. An hour earlier all the light sail had been taken in, and at 9 o'clock the flying jib stay was carried away. At noon a gale was blowing, and it increased until it attained the force of a hurricane. All sail was lowered at 3 p. m. and the schooner kept off to the north because of the wind. At 4 o'clock, when the schooner was laboring heavily and the seas were coming over the deck, fore and aft, the deckload of rosin broke adrift. Several barrels that had broken adrift aft were thrown overbroad, as they were tearing up the deck. At 5 o'clock a high sea came over aft, damaging the life launch and stoving in the port on the after starboard
9 side of t[illegible] cabin. On June 23rd the ship worked so badly that it became necessary to throw overboard the deckload, practically all of which had broken adrift. After the deckload had been thrown overboard the officers and crew were able to manage the sails and the ship during the remainder of the heavy weather encountered. The schooner arrived at Rio de Janeiro on or about August 26, 1918, but, owing to the circumstances set forth herein, did not deliver the deckload of rosin referred to in the libel.

Eleventh. According to the contract of affreightment under which the Schooner St. John's, N. F., accepted the 800 barrels of rosin for carriage to the Port of Rio de Janeiro, the vessel had the right to stow said cargo on deck, and, as it had been properly and securely stowed on deck, and as the jettisoning of said cargo was justifiable and arose through no fault of the ship, her officers or crew, this claimant is relieved of all responsibility for whatever damage libelant may have sustained.

Wherefore claimant prays that the libel be dismissed with costs to the claimant, and that claimant be granted such other and further relief as the justice of the cause may require.

HAIGHT, SANDFORD & SMITH,
Proctors for Claimant.

27 William St., New York City, N. Y.

10 SOUTHERN DISTRICT OF NEW YORK, *ss:*

John R. Fox, being duly sworn, deposes and says: I am treasurer of the St. John's, N. F., Shipping Corporation, the claimant herein. I have read the foregoing amended answer and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds for my belief are my familiarity with the affairs of the claimant as its treasurer aforesaid.

The reason why this verification is not made by the claimant is that it is a corporation and incapable of making the same.

JOHN R. FOX.

Sworn to before me this 8th day of Dec., 1919.

[SEAL.] JAMES C. WEBSTER,
Notary Public, New York County.

11 SCHEDULE A ANNEXED TO AMENDED ANSWER.

(Copy.)

Freight Contract.

No. 5070.

Engaged for account of the General Commercial Co. Ltd. of U. S.
Freight from New York to Rio de Janeiro.
Per Amer. Schr. St. Johns N. F., to arrive and expected to sail June 8/10.
W. & S. Job & Co. Agents.
800 Barrels Rosin.
(On or Under Deck Ship's Option.)
At $30.00 net, per 2,240 lbs. prepaid.
Brokerage at 1¼%.

This contract is made subject to conditions of Act of Congress governing Bills of Lading, approved Feb. 13th, 1893, and to terms of Bills of Lading in use by Steamer's Agents.

Should steamer not pass Sandy Hook before 6 P. M. of expected sailing day (as reported by Maritime Exchange), or should steamer arrive known to be so disabled as to prevent her sailing within ten days after her expected sailing day, shippers have option of cancelling this contract on giving Agent's notice to that effect by noon of the first business day following expected sailing day or announcement of disability.

Steamer reserves right of taking grain in excess of her net register tonnage.

New York—June 6th, 1918.

(Signed M. C. RICHARDS,
Per CHARLES ZELLER,
Freight Con'tor.

2 *Libelant's Exceptions to Answer.*

United States District Court, Southern District of New York.

A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

CHOONER ST. JOHN'S, N. F., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

The libelant hereby excepts to the answer of the claimant herein n the ground that the said answer does not state facts sufficient on ıe face thereof to constitute a defense to the cause of action alleged ı the libel.

Wherefore, libelant prays that the answer of the claimant herein e struck out and that the libelant have an interlocutory decree for s damages and costs.

HAYS, KAUFMAN & LINDHEIM,
CROWELL & ROUSE,
Proctors for the Libelant.

24 Broad Street, Borough of Manhattan, New York City.

3 *Interlocutory Decree.*

ıt a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Court Rooms Thereof, in the Old Post Office Building, Borough of Manhattan, City of New York, on the 9 Day of December, 1919.

Present: Hon. Julius M. Mayer, District Judge.

68/359.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F.

This cause having been heard on the pleadings and exceptions to he amended answer herein, and having been argued and submitted by the advocates for the respective parties, and due deliberation having been had, it is now

Adjudged and decreed that the liabilities of the claimant are fixed erein by the clean bill of lading issued for the shipment and not by any prior cargo space engagement or freighting agreement, as lleged in the answer, and that further the shipment was loaded on leck without proper relieving endorsement on the bill of lading,

and was lost by the schooner during the voyage, and further
14 that the amended answer is insufficient in law to constitute a defense to the cause of action alleged in the libel herein, and it is

Further ordered, adjudged and decreed that the libelant recover against the claimant the amount of its damages due as alleged in the pleadings, and that it is referred to Henry E. Mattison, Esq., as commissioner, to ascertain the amount so due, and to report the same to this Court with all convenient speed.

J. M. MAYER,
U. S. D. J.

15 *Notice of Offer of Damages After Entry of Interlocutory Decree.*

United States District Court, Southern District of New York.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

SIRS:

Please take notice that in pursuance of the provisions of Rule 31 of the Admiralty Rules of this court, and without prejudice to the right of the claimant, St. John's, N. F., Shipping Corporation, to appeal, we hereby, on behalf of said St. John's, N. F., Shipping Corporation, offer to allow the libellant's damages under the interlocutory decree which has been entered herein, to be assessed at the sum of twenty-five thousand two hundred seventeen and 40/100 Dollars ($25,217.40), together with costs, to be taxed to the date of this offer.

Dated New York, February 6, 1920.

Yours, etc.,

HAIGHT, SANDFORD & SMITH,
Proctors for the Claimant.

27 William Street, Borough of Manhattan, City of New York.

16 To Messrs. Hays, Kaufmann & Lindheim, Messrs. Crowell & Rouse, Proctors for Libellant, 24 Broad Street, Borough of Manhattan, City of New York.

Order for Commission and Amending Libel.

At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Court Rooms Thereof, in the Post Office Building, Borough of Manhattan, City of New York, on the 13 Day of February, 1920.

Present: Hon. Augustus N. Hand, District Judge.

No. 68/359.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

A motion for the issuance of a commission to examine witnesses at Rio de Janeiro, Brazil, having duly come on to be heard on
17 affidavit of Victor Hansen, verified January 30th, 1920, and notice of motion of the same date, and on the argument of the said motion it appearing advisable that the libel herein be amended as to the amount of damages claimed, and such motion having been made with consent of counsel in open Court upon the said hearing, and having been duly argued by the proctors for the respective parties, now, after hearing E. Curtis Rouse, of counsel for the libelant, in behalf of the motion to amend the libel, and Henry M. Hewitt, of counsel for the claimant, in opposition to both of said motions, and due deliberation having been had and due cause appearing therefore, it is

On motion of Crowell & Rouse, proctors for the libelant,

Ordered that the amount of damages prayed for in the libel herein be amended to the sum of Forty-nine Thousand Five Hundred Dollars ($49,500), and that Article "Eighth" of the libel be thereby amended to read as follows:

"Eighth. By reason of the failure of the Schooner 'St. John's, N. F.,' to deliver the aforesaid shipment of eight hundred (800) barrels of rosin, libelant has sustained damage in the sum of Forty-nine Thousand Five Hundred Dollars ($49,500), which amount has been duly demanded of the owners of the said schooner and payment of the whole, or any part thereof, has been refused,"

without prejudice to the present status of the case and the issues herein, and it is further

18 Ordered that a commission issue herein to the United States Consul, Vice-Consul or Consular Agent, one to act at Rio de Janeiro, Brazil, to examine Herbert Moses, E. E. Bechtinger, Jose Rainho, Mario Jardio, Hiqaf Monteiro, witnesses on behalf of

the libelant, upon written interrogatories and cross-interrogatories, if any.

AUGUSTUS N. HAND,
U. S. D. J.

19 *Stipulation Filed with Commissioner's Report.*

United States District Court, Southern District of New York.

68/359.

A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F.

Adjourned Hearing before Henry E. Mattison, Special Commissioner in Interlocutory Decree herein, held August 26th, 1920.

Appearances:

Crowell & Rouse (E. C. Rouse), for libelant.
Haight, Sandford & Smith (H. M. Hewitt), for claimant.

It is hereby stipulated and agreed by and between the proctors for the respective parties herein:

That the testimony heretofore taken before the Commissioner on the question of the assessment of damages and also the commissions heretofore issued at Rio on such item of damages be and they hereby are withdrawn from the Commissioner and need not be considered by the Commissioner or become part of the record on any

20 appeal taken herein on this point.

That the shipment of eight hundred (800) barrels of Rosin involved in this action weighed 180,092 Kilos.

That its invoice cost at New York at the time of shipment was $21,037.02.

That the libelant was the consignee and not the shipper.

That the libelant has paid the shipper the full invoice cost.

That the shipment was delivered to the claimant and that a clean Bill of Lading was issued therefor for transportation of said shipment on the Schooner "St. John's, N. F."

That the said shipment was loaded on deck of the said Schooner and transported as deck cargo and was lost at sea before the arrival of the Schooner at Rio.

That the Schooner "St. John's, N. F.," arrived at Rio on August 26th, 1918, and failed to deliver any of the said cargo.

That the shipper procured General Marine Insurance of the said shipment on the aforesaid Bill of Lading for the amount of $23,209.

That the libelant was not able to collect the said insurance from

the insurers for the reason that the Bill of Lading for the eight hundred (800) barrels of Rosin did not contain an endorsement.

That the said cargo was shipped on deck and the risk of shipment on deck was not covered by the insurance, by reason of which facts the insurer disclaimed liability.

That the total market value of the eight hundred (800) barrels of Rosin on August 26th, 1918, the date the Schooner "St. John's, N. F.," arrived at that port, less duty and expenses saved by the libelant, was $40,908.20.

21 *Commissioner's Report.*

United States District Court, Southern District of New York.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO,
Libellant,

against

SCHOONER ST. JOHN'S, N. F.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

On or about December 9, 1919, an interlocutory decree was entered in the above-entitled case ordering, adjudging and decreeing, among other things, that it be referred to the undersigned as commissioner to ascertain and compute the amount of the libellant's damages due as alleged in the pleadings and to report the same to this court with all convenient speed.

I, Henry E. Mattison, the commissioner to whom the matter was referred, do hereby report:

That I have been attended by the proctors for the respective parties, who have filed with me a copy of the aforesaid interlocutory decree, the original bill of lading, the original invoice (Libellant's Exhibit 3) and a stipulation, all of which are herewith filed with my report.

This suit was brought to recover damages sustained as a result of the jettison of a cargo of 800 barrels of resin which were
22 loaded on deck of the schooner "St. John's N. F.," while on a voyage from New York to Rio de Janeiro. A clean bill of lading had been issued for the said cargo of resin. The answer admitted the clean bill of lading, the loading on deck, the jettison of the entire cargo on board and non-delivery on arrival at destination. Libellant's exceptions to the answer as not stating a legal defense were sustained and an interlocutory decree for the relief prayed for was entered, the court holding the claimant to full liability for failure to place relieving clauses on the bill of lading permitting deck load.

The bill of lading in this case was what is known as a clean bill of lading and as such imports under deck loading. Admittedly this cargo was loaded on deck. Stowage on deck will only be authorized

"By a custom binding in the trade or port of loading * * *
"Or by express agreement with the shipper of the particular goods
"so to stow them."
Scrutton on Charter Parties, Ninth Edition, p. 140.

Custom has not been pleaded here and does not exist. There is an absence of an agreement to stow the cargo on deck and the absence of such consent or agreement with the shipper wipes out the bill of lading and all its terms.

"The effect of deck stowage not so authorized will be to set aside
"the exceptions of the charter or bill of lading and to render the
"ship owner liable under his contract of carriage for damage happen-
"ing to such goods."
Scrutton on Charter Parties, Ninth Edition, p. 141.

23 The ship owner in this case is in the same position as in the case of a deviation.
Royal Exchange Co. v. Dickson (1886), 12 Appeal Cases, 11.
Globe Navigation Co., Ltd., v. Russ Lumber Co., 167 Fed. Rep., 228, at p. 230.
The Indrapura, 171 Fed. Rep., p. 929.

It is uniformly held that in cases of such deviation from instructions, consent or usual prosecution of the voyage according to the bill of lading (i. e., under deck stowage on a clean bill of lading) the bill of lading becomes of no effect and the carrier cannot rely upon the exemptions and limitation clauses.

The carrier, therefore, becomes subject to the general rule of damages which in a case of entire non-delivery is the market price of the goods, less the landing charges, at the time and place the shipment should have arrived.

"Apart from special circumstances, which may effect the goods
"in such ways as we have been considering, the value of the goods
"for which compensation must be made, when they have been lost,
"or damaged, is that which they would have had at the time and
"place at which they ought to have been delivered."
Carver, Carriage of Goods by Sea, Sixth Edition, 958.

See also:

Rodocanachi v. Milburn (1887), 18 Q. B. D., 67, at 76.
Williams v. Agius, Ltd. (1914), Appeal Cases, 510 at 530.
24 Southern Pacific Ry. Co. v. Reagin, 228 Fed. Rep., p. 14.

The parties by the stipulation filed herein having agreed that the total market value of the eight hundred (800) barrels of resin on August 26, 1918, the date on which the schooner "St. John's N. F.," arrived at Rio de Janeiro, less duty and expenses saved by the libellant, was $40,908.20, I find and report as follows:

That the libellant is entitled to recover as its damages herein the sum of $40,908.20, with interest thereon from August 26, 1918.

All of which is respectfully submitted.

Dated, New York, September 27, 1920.

HENRY E. MATTISON,
Commissioner.

Bill of Lading Filed with Commissioner's Report.

Bill of Lading.

W. & S. Job & Co., Inc.,

Agents for

St. John's N. F. Shipping Corp.

New York and Brazil.

Received, in apparent good order and condition from The General Commercial Company, Ltd. of U. S. to be transported by vessel St. Johns, N. F., now lying at the Port of New York, and bound for Rio de Janeiro or as near thereto as she may safely get, with liberty in addition to any liberty expressed or implied in this Bill of Lading, to proceed to and use, any port or ports, in any rotation, for any purposes whatsoever, whether in or out of or beyond the customary or advertised route, and all such ports shall be deemed to be included in the intended voyage, and to carry goods of all kinds, dangerous or otherwise, and to carry Live Stock and/or cargo on deck—or failing shipment by said vessel, in and upon a following vessel, ——, being marked and numbered as per back hereof, shippers' weight (quality, quantity, gauge, contents, weight and value unknown) and to be delivered by the said vessel in like good order and condition at the port of Rio de Janeiro (or as near thereto as she may safely get), where the said vessel's responsibility shall cease, thence to be transshipped to —— and delivered unto: S. A. Compania General Commercia or to his or their assigns, freight, primage and charges to be prepaid before the sailing of the vessel from
26 New York, without any allowance of credit or discount or otherwise, at the rate of as per back hereof, said monies being hereby expressly stipulated earned and to be irrevocably retained by the vessel and her owners in any event, including ship and/or cargo lost or not lost.

It is mutually agreed that the vessel shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in craft and/or lighters to and from the vessel at the risk of the owners of the goods; and, in case the vessel shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other vessel; that the carrier shall not be liable for loss or damage occasioned by, due to or arising from causes beyond the carrier's control, by the act of God, vis major, by collision,

stranding, jettison or wreck, perils of the sea or other waters, by fire from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; by theft or pilferage of any person, on board, in craft or on shore, whether in the employ of the shipowner or not; by arrest and restraint of Princes, rulers or people; embargoes, restrictions, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, or any latent defect in hull, machinery or appurtenances, or unseaworthiness of the vessel, whether existing at the time of shipment, or at the beginning of the voyage, provided the owners have exercised due diligence to make the vessel seaworthy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature
27 of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value. General Average according to York and Antwerp rules of 1890. If the owner of the said vessel shall have exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, Master or crew in the navigation or management of the vessel or from latent or other defects or unseaworthiness of the vessel whether existing at the time of shipment or at the beginning of the voyage but not discoverable by due diligence the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average including allowance and expenses to the ship or for any special charges incurred, but with the shipowner shall contribute in General Average and shall pay such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

All costs, sacrifices and expenditures incurred when on the ground to bring the ship afloat (including towage and/or lighterage
28 etc.) even if the ship and cargo were not in immediate or prospective peril, to be considered as General Average to which the consignee and/or holders of the bills of lading hereby agree to contribute.

This contract is made subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February 1893, entitled "An act relating to the navigation of vessels, etc.," and subject also to the war clause contained on the back hereof, and is further conditional upon the sailing of the vessel. And if any

time in the judgment of the Carrier, conditions of war or hostilities, actual or threatened, are such as to make it unsafe or imprudent for its vessels to sail, the sailing of any vessel or vessels may be postponed or cancelled; and in that event the Carrier may at its option cancel this contract and shall be relieved thereafter from any liability hereunder, except to return to the shippers, at the shippers' expense and risk, whatever cargo may have been already received under this contract.

Owing to conditions of war or hostilities existing or threatened, this shipment is accepted at the sole risk of shipper, consignee, and/or assigns thereof of arrest, restraint, capture, seizure, detention or interference of any sort directly or indirectly by any Power; and the Carrier and its representatives are privileged in its or their absolute discretion, if deemed advisable for the protection of the vessel or any cargo or persons on board or to avoid loss, damage, delay, expense or other disadvantage or danger, either with or without proceeding to or toward the port of discharge or entering or
29 attempting to enter or discharge the goods there, and whether such entry or discharge be permitted or not, to proceed to any other port or ports or return to the port of shipment once or oftener in any order or rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at any such port or ports at the first or any subsequent call, and full bill of lading freight, together with extra compensation for additional transportation and all other charges shall be paid by shipper, consignee and/or assigns, and shall be a lien on the goods; the said monies being hereby expressly due and payable the vessel and by the vessel to be irrevocably retained whether or not she has started on her voyage, the shipper hereby expressly assuming the risks of abandonment of the voyage, embargoes and all other risks hereunder in consideration of the special rate of freight or monies in the nature of freight stipulated on the back hereof, anything herein to the contrary notwithstanding.

It is mutually agreed that transshipment of cargo for ports where the aforesaid ship does not call or for shipowners' purposes is to be at the expense of the shipowner, but subject to all conditions, stipulations and exceptions in the customary form of Bill of Lading or freight not in use at the time of the transshipment by the carrier or carriers completing the transit. The shipowner is not and shall not be deemed to be the agent for such carrier or carriers nor shall the shipowner be liable in any respect whatever for any loss, damage or delay in regard to the goods after they shall have left the ship's tackle and/or decks, where the vessel's responsibility
30 shall cease absolutely, anything to the contrary herein notwithstanding. The goods shall be forwarded as soon as practicable, but the shipowner shall not be liable for detention and the risks and expenses of warehousing shall be borne by the goods, their owners and their consignees; nor shall the shipowner be responsible for the negligence or non-performance of any other vessel, carrier, agent or person to whom is entrusted or delivered the aforesaid merchandise or treasure (which the shipowner is hereby au-

thorized to do) for the purpose of forwarding the same as aforesaid.

It is further agreed that in addition to the liability of any other person as owner of the goods, shipper shall be liable for all contributions in general average and special charges payable in respect of the goods, whether or not he be liable therefor as owner of the goods.

1. It is also mutually agreed that unless a higher value be stated herein the value of the property hereby receipted for does not exceed $100 per package, and that the freight has been adjusted on such valuation, and no oral declaration or agreement shall be evidence of a different provision or of a waiver of this clause. In computing any liability for negligence or otherwise, by the shipowner as carrier or otherwise, regarding any property hereby receipted for no value shall be placed on the said property higher than the invoice cost not exceeding $100 per package (or such other value as may be expressly stated herein), nor shall the shipowner be held liable for any profits or consequential or special damages, and the shipowner shall have the option of replacing any lost or damaged goods.

31 2. Also, that the carrier shall not be liable for articles specified in Section 4281 of the Revised Statutes of the United States, unless written notice of the true character and value thereof is given at the time of lading, and entered in the Bill of Lading.

3. Also, that shippers shall be liable for any loss or damage to vessel or cargo caused by inflammable, explosive or dangerous goods shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

4. Also, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the vessel or cargo may incur or suffer by reason of the incorrect or insufficient making, numbering or addressing of packages or description of their contents.

5. Also, that in case the vessel shall be prevented from reaching her destination by Quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

6. Also, that the vessel may commence discharging immediately on arrival and discharge continuously, day and night, any custom of the port to the contrary notwithstanding, the collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the vessel's deck by the consignee directly they come to hand in dis-
32 charging the vessel the master or vessel's agent to be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the goods shall be deemed delivered and vessel's responsibility ended, the carrier not to be re-

sponsible for any loss or damage to the goods during their stay in lighter, warehouse, sheds or loading quay, but the vessel and carrier to have a lien on such goods until the payment of all costs and charges so incurred; or if vessel or its agents deem it advisable to save expense and/or delay due to congestion or other conditions at port of discharge, vessel may discharge goods on lighters and/or craft and/or stores, at shipper's risk and expense, which shall be deemed delivery to the consignee; and the carrier shall be relieved from any further responsibility, but shall have a lien on all such goods until the payment of all costs and charges so incurred.

7. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8. Also, that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

9. Also, that merchandise on wharf awaiting shipment or delivery be at owner's risk of loss or damage the carrier not to be responsible for any loss or damage to the goods during their stay in lighter, warehouse, sheds or loading quay, any custom of the port to the contrary notwithstanding.

33 10. Also, that this bill of lading, duly endorsed, be given up to the vessel's consignee in exchange for delivery order.

11. Also, that freight prepaid will not be returned, goods lost or not lost.

12. Also, that parcels for different consignees collected or made up in single packages addressed to one consignee, pay full freight on each parcel.

13. Also, that the carrier shall not be liable for loss or injury, or detention to packages intended for different consignees but made up into one package, unless the contents and value of each separate package be given before shipment, and freight paid accordingly.

14. Also, that the Master Porterage of the delivery of the cargo be done by the consignee of the vessel, and the expense thereof be paid by the Receivers of Cargo.

15. Also, where goods are weighed or measured on board to ascertain Freight, the charges for weighing, &c., to be paid by the Consignee, and the carrier to have a lien on the Goods for such charges. The consignee or the party applying for their Goods are to see that they get their right marks and numbers, and after the Lighterman or Wharfinger, or the party applying for the Goods has signed for same, the Ship and the owners are respectively discharged from all responsibility for mis-delivery or non-delivery. The Ship to be entitled to commence discharging immediately she arrives,

and to continue discharging without intermission day and night. Any bags belonging to the ship not to leave from alongside. The company has the privilege of reweighing or remeasuring the
34 goods at *at* consignee's expense when done at his request, or when the weight or measurement proves to be in excess of that stated in bill of lading, and freight at the same rate is due on any excess. Captain has privilege of collecting the freight on landing of the goods before delivery, if freight has not been prepaid.

16. Also, full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to the Carrier upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, without deduction or refund, Goods or Vessel lost, or not lost, or if the voyage be broken up; and the same shall be payable in the United States currency or in New York funds; and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid) surviving delivery, and in case of loss of any part of the Goods shall have a lien on the Goods or any part or proceeds, for the whole thereof; and the shipper, consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding any lien therefor has been surrendered.

17. Also, the carrier shall be entitled to the benefit of any insurance on the goods and to any payments made by or on behalf of the insurers thereof, whether under the guise of advances,
35 loans or otherwise. The carriers shall not be liable for any claim whatsoever unless written notice thereof shall be given to the carrier before removal of the goods from the wharf. No suit to recover for loss or damage shall in any event be maintainable against the carrier unless instituted within three months after the giving of written notice as above provided. No agent or employee shall have authority to waive any of the requirements of this clause.

18. Also, the shipper, consignee and/or assigns, shall pay any duty, tax, impost, fee or the like for which the Carrier may be charged upon account of the goods, not due to the Carrier's fault, and also any fine or penalty incurred by, or loss or expense occasioned to the Carrier by reason of illegal, incorrect or insufficient documents or marking or numbering of packages or goods, or description of contents or weight or other particulars or by reason of any other act or omission of shipper, consignee and/or assigns.

19. Also, that single packages exceeding 2 tons in weight, shall be liable to pay extra charges, if any, for loading, handling, transhipping or discharging. Also that the vessel or any of the servants

of the company shall not be liable for any damage or loss occurring from any accident in loading, handling, discharging or transshipping, if packages exceed 2 tons in weight, and in case of any damage or loss resulting to the vessel, cargo, lighters, cranes, or hoisting tackle, owing to incorrect weight having been declared, shippers and/or consignees of such cargo, shall be responsible for such loss or damage.

20. Also, Steamer has the right to carry cargo on deck.

36 21. Also, full weight is to be paid on barrels whether full, part full or empty.

22. Also, that vessel shall not be liable for splits, shakes or breakage to lumber and logs.

23. Also, that no claim shall under any circumstances whatever attach to the ship or her owners for failure to notify consignees or any other party of arrival of goods.

24. Also, that where grain is stowed together with other grain without separation, either from the same or other shipper each Bill of Lading to bear its proportion of loss and/or damage, if any.

And finally, in accepting this Bill of Lading, the Shipper, Owner and Consignee of the goods and the Holder of the Bill of Lading, agreed to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were signed by such Shipper, Owner, Consignee or Holder.

The carrier shall not be liable for loss or damage occasioned by contact with or smell or evaporation from any other goods.

Should the vessel be detained by the authorities of a belligerent country and be required to discharge in or to return to a belligerent country all or some of the goods, the Master at his option is authorized either to discharge such goods at a port of a belligerent country, or, after reaching a subsequent port or the port of destination, to forward the goods to such port as the said authorities may require, to store the goods there and/or deal with them in such manner as the said authorities may direct, at the risk and expense of the owners of the goods.

37 The port where the goods are so discharged or to which they are so forwarded shall then be deemed to be the port of destination, the Master, the Company or their Agents having a lien on such goods for the freight as per B/L and for all expenses incurred, including the additional freight from the port whence the goods are forwarded to a port in a belligerent country as above described. And said freight and expenses, including any such additional freight shall be paid to the Steamship Company by Shipper and/or receivers and/or owners of the goods, on demand.

Reverse side: New York to Brazil.

W. & S. Job & Co., Inc.,

Agents for

St. John's N. F. Shipping Corp.

In view of war conditions vessel has liberty to proceed via any route to destination and to deviate in the course of the voyage or to remain in port as master may deem best in his judgment.

The ship shall have liberty to comply with any orders or directions as to employment, departure, arrival, routes, ports of call, stoppages, requisitions, or to any other subject whatsoever given by any Government or any department thereof, or any person acting or purporting to act with the authority of any Government, or of any department thereof, or by any committee or person having under the terms of a War Risk Insurance (if any) the right to give
38 such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or not done the same shall not be deemed a deviation or other default and shall not give rise to any liability on the part of the Ship or Her Owners. It is further a term of this contract that notwithstanding anything to the contrary contained herein the ship may in pursuance of advices, orders or directions aforesaid refuse to receive cargo, or may sail with part cargo only and may discharge the whole or part of the cargo at any port or place whatsoever where ship's responsibility shall cease or may transship at any stage of the voyage the whole or part of the cargo into any other vessel for carriage to the port of destination, or to any other port or place whatsoever.

Shipper's Description of Goods.

(Carrier's Responsibility for Description Being Limited as Hereinbefore Provided.)

Marks	Numbers.	Packages and contents.	Description of wrapping.	Gross pounds.	Measurement.	Rate.	Freight.
Alminko Rio	500/1,299	800 Bbls. Rosin		397,120			$5,357.14
				Total Freight U. S. Gold.....			$5,357.14

Freight prepayable.

.....ft. .....in.	per 40c ft.....	£.....
.....@	per	£.....
.....@	per 2,240 lbs.....	£.....
	5 per cent Primage.....	.....
	Charges	.....
	Total	£.....

Shipper's Marks Unknown.

39 In witness whereof, the Master or agent or the said W. & S. Job & Co., Inc., hath affirmed to Three Bills of Lading, all of this tenor and date, one of which being accomplished, the others stand void.

Dated in New York, June 12th, 1918.

W. & S. JOB & CO., INC.,
Agents for St. John's N. F. Shipping Corp.,
By J. R. FOX.

(Endorsed on face:) National City Bank N 230191 New York.

(Endorsements on Back:) The General Commercial Company Ltd. of United States, Victor Hansen, Pres. S. A. Companhia Geral do Rio de Janiero, J. J. Bechtinger, P. P. M. V. Hansen, Directores Gerentes, Joas Jelabest de Seinas. Consular B/L Fee. Duplicate.

40 LIBELANT'S EXHIBIT 3, FILED WITH COMMISSIONER'S REPORT.

(Copy)

Invoice No. 56.
Order No. 22 & 24 (Cables).

295 Broadway,
New York, June 19th, 1918.

Invoice the General Commercial Company, Ltd., of United States.

To S. A. Companhia Geral Commercial.
Rio de Janeiro, Brazil.
Per Barque "St. Johns, New Foundland."
Consigned to: S. A. Cia. Geral Commercial, Rio de Janeiro.
Insurance: Marine & War Risk.
Terms: draft at sight.
10-18-1M A&R 27681.

Marks.	Weight, kgs. Gross.	Net.			
Alminko. Rio. $500/1299.	67,194	53,756	300 Barrels $500/799, Containing: 148,170$ gro. Rosin K @ $115 per ton of 2,240$.....	$7,606.94	
	112,898	90,319	500 Barrels $800/1299, Containing: 248,950$ gro.		
	180,092	144,075	Rosin K @ $118 per ton of 2,240$.....	13,144.33	
			(As per enclosed packing list).....		$20,721.2
			Interest & Bank Charges on $21,050 @ 1½%.....		315.7
			Price CIF Rio including our commission		$21,037.0

E. & O. E.

41 For which amount we have drawn on you at sight in favor of The National City Bank.

Certified to be a true copy of our original invoice.

THE GENERAL COMMERCIAL COMPANY, LTD., OF UNITED STATES.
VICTOR HANSEN,
Pres.

Claimant's Exceptions to Commissioner's Report.

United States District Court, Southern District of New York.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

The claimant herein excepts to the report of the commissioner to whom it was referred to assess damages on the following grounds:

(1) In that the commissioner held that the effect of stowing the cargo on deck without the shipper's consent or agreement was to wipe out the bill of lading in all its terms.

(2) In that the commissioner failed to hold that the libelant's recovery should be limited to the invoice cost as provided in
42 Clause 1 of the bill of lading.

(3) In that the commissioner failed to hold that the libelant was estopped from recovering more than the invoice cost of the rosin, for the loss of which suit has been brought.

(4) In that the commissioner failed to hold that the liabilities of the claimant were fixed by the clean bill of lading issued for the shipment, as provided in the interlocutory decree dated December 9, 1919.

(5) In that the commissioner failed to give effect to the provisions of Clause 1 of the bill of lading which constituted the contract between the parties; said clause providing that

"In computing any liability for negligence or otherwise, by the shipowner as carrier or otherwise, regarding any property hereby receipted for, no value shall be placed on the said property higher than the invoice cost not exceeding $100 per package (or such other value as may be expressly stated herein)."

(6) In that the commissioner failed to limit the libelant's recovery to the amount actually lost by it by reason of the failure of the claimant to have endorsed on the bill of lading that the cargo was on deck; namely, the amount of $23,200, for which amount the said

shipment was insured and which said amount the insurers refused to pay because of the fact that the shipment was on deck.

Dated, New York, September 30, 1920.

HAIGHT, SANFORD & SMITH,
Proctors for Claimant.

27 William Street, New York City.

43 *Final Decree.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Court Rooms Thereof, in the Post Office Building, Borough of Manhattan, City of New York, on the 13th Day of October, 1920.

Present: Hon. Julius W. Mack, Circuit Judge.

No. 68–359.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., HER TACKLE, etc.

It having been referred to Henry E. Mattison, Esq., as Special Commissioner, to assess the damages herein by interlocutory decree entered herein in favor of the libelant on December 9th, 1919, and the said Special Commissioner having filed his report by which there is reported to be due to the libelant the sum of Forty Thousand Nine Hundred and Eight and 20/100 Dollars ($40,908.20), with interest thereon from August 26th, 1918, and exceptions to the said report having been filed by the claimant, and such exceptions having come on to be heard before, now, after hearing Henry M. Hewitt, Esq., of counsel for the claimant, in support of such exceptions and E. Curtis Rouse, Esq., of counsel for the libelant, opposed thereto, and after reading the Commissioner's report, and due deliberation having been had, it is,

44 On motion of Crowell & Rouse, proctors for the libelant,

Ordered that the exceptions be and the same hereby are overruled, and it is further

Ordered, adjudged and decreed that the report of the Special Commissioner be and it hereby is in all things confirmed, and that the libelant do have and recover from the schooner St. John's, N. F. her tackle, etc., the amount so reported due to it, together with its costs to be taxed herein, to wit, the sum of Forty Thousand Nine Hundred and Eight and 20/100 Dollars ($40,908.20), with interest thereon from August 26th, 1918, to the date of this decree, being the sum of $5,236.22, and its costs and disbursements as taxed, being the sum of $245.55, amounting in all to the sum of $46,389.97 and that the said Schooner St. John's, N. F., be condemned therefor and it is further

Ordered, adjudged and decreed that, unless an appeal be taken from this decree within the time limited by law and rules and practice of this Court, the stipulators for costs and for value on the part of the claimant of the said Schooner St. John's, N. F., do cause the engagement of their stipulations to be performed within ten (10) days or to show cause within four (4) days thereafter, or on the first subsequent day of jurisdiction, why process should not issue against them to enforce satisfaction of this decree.

J. W. MACK,
U. S. C. J.

45 *Notice of Appeal.*

United States District Court, Southern District of New York.

68–359.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., HER TACKLE, etc., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

SIRS:

Please take notice that the claimant herein, St. John's, N. F., Shipping Corporation, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in this action in the office of the Clerk of the above-entitled Court on or about the 13th day of October, 1920, and from each and every part of said decree.

Dated, at New York City, October 26th, 1920.

Yours, etc.,

HAIGHT, SANDFORD & SMITH,
Proctors for Claimant-Appellant.

27 William Street, Borough of Manhattan, New York City.

To:

Alexander Gilchrist, Jr., Esq.,
Clerk of the United States District Court
for the Southern District of New York.
Messrs. Hays, Kaufman & Lindheim,
Messrs. Crowell & Rouse,
Proctors for Libelant.

46 *Assignments of Error.*

United States District Court, Southern District of New York.

68–359.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

The claimant-appellant, St. Johns, N. F., Shipping Corporation hereby assigns error in the findings, decision and decree of the District Court herein as follows:

1. In that the court found that the liabilities of the claimant were fixed solely by the clean bill of lading issued for the shipment herein.

2. In that the court failed to find that the liabilities of the claimant were fixed by the contract of affreightment as evidenced by the freight contract and the bill of lading.

3. In that the court found that knowledge on the part of the shipper that the shipment was loaded on deck in accordance with the liberty granted in the said freight contract as alleged in the amended answer herein was no defense to the cause of action alleged in the libel herein.

4. In that the Court sustained the exceptions of the libelant to the amended answer of the claimant and entered a decree for the libelant.

47 5. In that the court failed to sustain the claimant's exceptions to the Commissioner's report filed herein.

6. In that the court found that the effect of stowing the cargo on deck was to wipe out the bill of lading in all its terms.

7. In that the court failed to find that the libelant's recovery should be limited to the invoice cost as provided in Clause 1 of the bill of lading.

8. In that the court failed to find that the libelant was estopped from recovering more than the invoice cost of the rosin for the loss of which this suit has been brought.

9. In that the court failed to find that the liabilities of the claimant were fixed by the clean bill of lading as provided in the interlocutory decree herein, dated December 9, 1919.

10. In that the court failed to give effect to the provisions of the bill of lading which it had found to constitute the contract between the parties.

11. In that the court failed to limit the libelant's recovery to the amount actually lost by it by reason of the failure of the claimant to have endorsed on the bill of lading that the cargo was on deck; namely, the amount of $23,200, for which amount the said shipment was insured and which said amount the insurers refused to pay because of the fact that the shipment was on deck.

12. In that the court allowed libelant to recover $40,908.20, the market value of the 800 barrels of rosin at Rio de Janeiro on August 26, 1918, the date of the arrival of the Schooner St. Johns, N. F., at that port.

48 13. In that the court rendered a decree for the libelant.

14. In that the court failed to dismiss the libel herein with costs.

And the claimant-appellant prays that the decree herein may be reversed and that it may be restored to all things which it has lost by reason of said decree.

Dated, New York, November 6, 1920.

HAIGHT, SANDFORD & SMITH,
Proctors for Claimant-Appellant.

27 William Street, New York City.

49 *Stipulation.*

United States District Court, Southern District of New York.

S. A. COMPANHIA GERAL COMMERICAL DO RIO DE JANEIRO,
Libelant,

against

SCHOONER ST. JOHN'S, N. F., HER TACKLE, etc., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

It is hereby stipulated and agreed by and between the parties herein that the foregoing printed copy of the record on appeal is a true transcript of the record as agreed on by the parties herein, and may be certified by the Clerk of this court and filed in the office of the Clerk of the Circuit Court of Appeals.

Dated at New York City, November 27, 1920.

HAYS, KAUFMAN & LINDHEIM,
CROWELL & ROUSE,
Proctors for Libelant-Appellee.
HAIGHT, SANDFORD & SMITH,
Proctors for Claimant-Appellant.

50 *Clerk's Certificate.*

United States District Court, Southern District of New York.

S. A. COMPANHIA GERAL COMMERICAL DO RIO DE JANEIRO, Libelant,

against

SCHOONER ST. JOHN'S, N. F., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant.

I, Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled cause as agreed on by the parties herein, made up pursuant to Rule No. 4 in Admiralty of the United States Circuit Court of Appeals for the Second Circuit.

In testimony whereof, I have caused the seal of the said Court to be hereto affixed, in the City of New York and the Southern District of New York, this 11th day of December, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fifth.

ALEXANDER GILCHRIST, JR.,
Clerk.

51 *Stipulation.*

United States Circuit Court of Appeals for the Second Circuit.

S. A. COMPANHIA GERAL COMMERICAL DO RIO DE JANEIRO, Libelant-Appellee,

against

SCHOONER ST. JOHN'S, N. F., HER TACKLE, etc., ST. JOHN'S, N. F., SHIPPING CORPORATION, Claimant-Appellant.

It is hereby Stipulated and Agreed by and between the proctors for the respective parties hereto that the following testimony, exhibits, etc., constitute all the proceedings in this Court, had pursuant to the direction of this Court given in its opinion, a copy of which is annexed to this stipulation:

Testimony for the Libelant-Appellee.

1. Testimony of Victor Hansen, taken at New York City on June 1, 1921.

52 2. Testimony of Victor Hansen recalled on June 13, 1921.

3. Testimony of Victor Hansen recalled on June 15, 1921.

4. Deposition of Alexander Holst taken at Stockholm, Sweden, on August 19, 1921.

5. Testimony of Charles R. Zeller, taken at New York City on September 9, 1921.

6. Extract from first deposition of E. E. Bechtinger, taken at Rio.

Testimony for the Claimant-Appellant.

1. Testimony of John R. Fox taken at New York City on June 13, 1921.

2. Testimony of John R. Fox recalled on June 28, 1921.

3. Testimony of John R. Fox recalled on November 3, 1921.

4. Deposition of E. E. Bechtinger taken at Rio de Janeiro, Brazil, on November 22, 1921.

5. Stipulation regarding the testimony of Ernest J. Pearce and Frank E. Steele, dated June 6, 1921.

Libelant-Appellee's Exhibits.

1. Exhibit A-1, Bill of Thomas Sealy for 500 barrels of rosin.

53 2. Exhibit A-2, Bill of Thomas Sealy for 300 barrels of rosin.

3. Exhibit B, Notice draft paid.

4. Exhibit C, Letter dated September 16, 1918.

5. Exhibit D, Cablegram (read into record at page 41).

6. Exhibit E, Cablegram (read into record at page 41).

7. Exhibit F, Letter dated December 19, 1918, and two enclosures.

8. Exhibit G, Letter dated December 8, 1918.

Claimant-Appellant's Exhibits.

Exhibit 1, Confirmation of order.
Exhibit 2-A, Dock permit 500 barrels of rosin.
Exhibit 2-B, Dock permit for 300 barrels of rosin.
Exhibit 3-A, Letter dated December 11, 1918.
Exhibit 3-B, Debit note enclosed with Exhibit 3-A.
Exhibit 4, Letter dated February 7, 1919.
Exhibit 5, Letter dated December 23, 1918.
Exhibit 6, Freight contract. (Printed in original transcript of record page 11.)
Exhibit 7, Dock receipt, 300 barrels of rosin.
Exhibit 8, Dock receipt, 500 barrels of rosin.

Exhibit 9, Extract of letter dated December 3, 1918. (Read into the record at page 38.)

Exhibit 10, Cablegram. (Read into the record at page 39.)

Exhibit 11, Extract from letter dated January 9, 1919.

54 Exhibit 11-A, Letter dated March 22, 1919.

Exhibit 12, Letter dated August 7, 1919.

Exhibit 13, Letter dated September 19, 1919.

Exhibit 14, Letter dated June 8, 1921, annexed by Mr. Holst to his answer to the 49th Cross Interrogatory and now marked Exhibit 14.

Exhibit 15, Letter dated August 2, 1921, annexed by Mr. Holst to his answer to the 49th Cross Interrogatory and now marked Exhibit 15.

And it is further stipulated

(1) That the claimant-appellant's Exhibit 6 (freight contract) as printed at page 11 of the original transcript of record, is a true copy of the original freight contract which was marked for identification at the examination of Mr. Fox on June 13, 1921, the original to be produced by appellant upon the argument and filed with the court if required.

(2) The original cargo manifest will be produced by appellant on the argument and filed with the court if required.

All of the annexed testimony and exhibits which do not consist of copies of documents heretofore filed herein may be and are, together with this stipulation, now filed in this case.

CROWELL & ROUSE,
Proctors for Libelant-Appellee.
HAIGHT, SMITH, GRIFFIN & DEMING,
Proctors for Claimant-Appellant.

55 *Opinion Pursuant to Which the Testimony Following Was Taken.*

United States Circuit Court of Appeals for the Second Circuit.

Before Hon. Henry Galbraith Ward, Hon. Charles Merrill Hough, Hon. Martin T. Manton, Circuit Judges.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant-Appellee,

against

SCHOONER "ST. JOHNS, N. F.," HER TACKLE, etc., ST. JOHNS, N. F., SHIPPING CORPORATION, Claimant-Appellant.

Appeal from Final Decree in Admiralty Entered in the District Court for the Southern District of New York.

The libel sets forth that on a day certain the General Commercial Company, Ltd., shipped on the "St. Johns" then at New York,
56 800 barrels of rosin to be transported to Rio de Janeiro and there delivered "to the libellant freight prepaid according to the terms and conditions of a certain bill of lading," a copy of which was attached to the libel. The answer denies the facts alleged in the above quoted portion of the libel.

In a separate paragraph the libel continues: That before the departure of the vessel from New York with said rosin on board the General Commercial Company duly endorsed the said bill of lading and delivered the same to the libellant or its agents or representatives who at the time of the schooner's sailing "were the holders of the said bill of lading and were the owners of the said shipment of rosin and entitled to delivery thereof in accordance with the terms and conditions of the said bill of lading." The answer denied—by denying any knowledge or information thereof sufficient to form a belief—all the allegations last above summarized.

The answer also affirmatively alleged that prior to the shipment in question the schooner's agents entered into a written contract with General Commercial Company by which it agreed to carry the said rosin "on or under deck, ship's option." A copy of this contract was attached to the answer, which then alleges that the said rosin was "properly and securely loaded on the deck of the schooner * * * being lashed down and boxed in and planked * * * all of which was within the knowledge of the shippers" i. e.
57 General Commercial Company. It is then alleged that the schooner encountered very heavy weather, which rendered necessary the jettison of the rosin, which peril of the sea was the only reason for admitted non-delivery at Rio. To this answer and all of it libellants filed peremptory exception, praying "that the answer of the claimant be struck out" and an interlocutory decree granted because said answer "does not state facts sufficient on the face thereof to constitute a defense to the cause of action alleged in the libel."

The District Court upheld the exception, entered an interlocutory decree, permitted an assessment of damages, and from the ensuing final decree claimant took this appeal.

Henry M. Hewitt, for Appellant.
E. Curtis Rouse, for Appellee.

HOUGH, *C. J.:*

Libellant did not ship the rosin. Its title thereto and right to sue depended upon the endorsement or transfer to it of the bill of lading. The title as alleged is excellent and very usual; yet it is to be remembered that a bill of lading is not a negotiable instrument or a piece of commercial paper, and the doctrines favoring an innocent holder for value do not wholly apply (Pollard vs. Vinton, 105 U. S., 7).

58 The bill of lading thus transferred is "clean"; that is, it contains no reference to the fact that the rosin was laden on deck, and it was issued by the ship's agents on behalf of the master

and owners. Consequently it imports under-deck shipment (The Delaware, 14 Wall., 579). Yet in Lawrence vs. Minturn, (17 How., 100), the facts being that goods were carried on deck in pursuance of the written contract of ship and shipper while the bill of lading for the same was "clean," the consignee (named in the bill of lading) who sued for loss of deck cargo, was held to be bound by the agreement of the shipper made before the issuance of the bill of lading.

It is to be remembered that we have nothing before us but a point of pleading, viz: whether viewing the allegations of the answer most favorably for the claimant any defense is suggested.

Libellant's position is that assuming an antecedent freight contract, in this instance it was no more than that shipment on deck would be at "ship's option," and that the ship by issuing a clean bill exercised that option and is accordingly conclusively estopped from going back of the bill itself.

But this interesting question is not reached until the libellant establishes its title and right to sue, i. e., it must prove its ownership in the rosin, an ownership different and distinct from that that of the General Commercial Company, and so establish not only that it is unaffected by any bargains or agreements made by the
59 shipper antecedent to the bill of lading, but its very right to bring suit under that bill.

We hold that on peremptory exception over claimant's denial it cannot be assumed or inferred that libellant is as near an "innocent holder for value" as the transferree of a bill of lading can ever become, and we hold further that such title must be affirmatively proved. Under these pleadings it is a part of libellant's case.

As to whether the issuance of this bill constituted an exercise of option we express no opinion further than the following: if the shipper had brought this suit and had executed the freight contract providing for deck shipment at ship's option, and knew that the rosin was actually put on deck,—the mere fact that by oversight or inadvertence a clean bill was issued would not be conclusive against the ship. On the other hand the case would be exactly like Lawrence vs. Misturn, supra.

It was error to strike out the answer on peremptory exceptions; testimony is necessary.

As this appeal is a new trial, we are not obliged to send the case back in order that evidence may be given.

It is directed that no mandate issue until the further order of this Court, and that the parties take testimony in this Court, for which purpose forty days from the date of filing this opinion are allowed to libellant, and forty days to claimant, calculated from the
60 date when libellant rests, or from the expiration of the first period of forty days as the case may be.

When the testimony has been taken, it is directed that the case stand for argument at the opening of the Term of October, 1921. Applications, if any, for extension of time for taking testimony may be had on reasonable notice, to any Judge of this Court.

61 *Testimony of Victor Hansen, a Witness on Behalf of the Libellant-Appellee, Taken on June 1st, 1921, at New York City.*

VICTOR HANSEN, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rouse:

Q. Mr. Hansen, are you the president and an officer of the General Commercal Company, Ltd. of the United States?
A. Yes, sir.
Q. Is that a New York corporation?
A. Yes, sir.
Q. Do you know the libelant in this case, the S. A. Companhia Geral Commercial Do Rio De Janerio?
A. Yes, sir.
Q. Where is that incorporated, do you know?
A. I do not know if it is incorporated. I do know it is a Brazilian company.
Q. It is what?
A. It is a Brazilian company.
Q. It is a Brazilian Company?
A. Yes.
Q. Separate and distinct from your New York company?
A. Yes, sir.
Q. Your New York company is a stock corporation?
A. Yes, sir.
Q. Do you know how the stock is owned?
A. Yes, sir.
Q. Does this Brazilian corporation own any of the stock of record?
A. No.
62 Q. Does your New York company own any of the stock of the Brazilian company?
A. No.
Q. Does your New York company own any share or interest in the Brazilian company?
A. No.
Q. Does your company share or participate in the profits or losses of the Brazilian company?
A. No.
Q. Do you remember a shipment of resin that was made by this New York company to the Brazilian company, the libelant in this case, on the Schooner St. John's, N. F.?
A. Yes.
Q. For which this suit is brought?
A. Yes.
Q. Was that sale of resin made by the New York company to the Brazilian company?

A. Yes.
Q. On what terms was it made?
A. It was a C. I. F. shipment, regular C. I. F. sale.
Q. Did you buy that resin?
A. Yes.
Q. As principal?
A. Yes.
Q. Did you pay for that resin?
A. Yes.
Q. Did your New York company pay for that resin?
A. Yes.
Q. Have you the bills covering that resin?
A. Yes.
Q. May I look at them?
A. (Witness produces bills.)
Q. These two bills represent the purchase by your company of the resin that was shipped?
A. Yes, sir.

63 Mr. Rouse: I offer these two bills in evidence except the pencil notations at the bottom. I suggest that we put copies in.

Mr. Hewitt: Yes.

Mr. Rouse: Then I offer in evidence these original bills except the pencil notations and it is agreed that the carbon copies may be marked and the originals returned to the bookkeeping department. The pencil figures on Exhibit A1 to be ignored.

(Bills referred to marked Exhibit A1 and Exhibit A2.)

Q. Now, Mr. Hansen, these bills represent the 800 barrels?
A. Yes.
Q. Your company paid for those?
A. Yes, sir.
Q. Is that part of the cost that you billed the libelant?
A. Yes.
Q. Under your C. I. F. shipment?
A. Yes.
Q. Did you prepay the freight?
A. Yes.
Q. Did you procure insurance?
A. Yes.
Q. War risk and Marine?
A. Yes.
Q. Did you prepare and send forward to the libelant a draft, an invoice with the shipping documents, namely, the bill of lading and insurance policies attached?
A. Yes.
Q. Was that draft paid by the libelant?
A. Yes.
Q. Did you subsequently get an advice of the payment of that draft from the National City Bank of New York?

A. Yes, sir.

Q. I show you this document and ask you if that shows advice of payment of the draft as well as of other drafts?

A. Yes.

64 Q. Is this third item the draft covering this particular shipment?

A. Yes.

Mr. Rouse: I offer that in evidence.

(Document referred to marked Exhibit B.)

Q. The proceeds of that draft have never been repaid by your company to the libelant in this action?

A. No, to the best of my knowledge.

Q. Did you ever send the money back?

A. No.

Q. Did you know at the time that you sent this draft forward to the libelant in this action that this merchandise had actually been shipped on deck, if that be a fact?

A. No.

Q. Did you afterward learn that the shipment had not been delivered?

A. Yes.

Q. You learned that by cable from the libelant?

A. Yes.

Q. Up to that time did you know or did your company know as to where on board the Schooner St. John's that shipment had been loaded?

A. Evidently we didn't know it. We thought we knew it. We thought the goods were loaded under the deck as usual.

Q. What led you to believe that?

A. The bills of lading.

Q. That is the bill of lading that was attached to the libel?

A. To the draft.

Q. Well, is that the bill of lading? (Showing bill of lading to witness.)

A. Yes.

65 Mr. Rouse: I will offer that in evidence a copy of which is printed on page 25 of the record, being the same document as is printed on page 25 of the record on appeal in this case.

Mr. Hewitt: That will be satisfactory.

Mr. Rouse: At this point, I offer in evidence the deposition of E. E. Bettinger taken under a commission heretofore issued herein, together with the exhibits thereto attached.

Mr. Hewitt: Objected to on the ground that the commission that went forward at that time simply covered the question of damages involved in the case and the commission was to be used before a commissioner, and furthermore on the ground that the witness did not answer the cross-interrogatories.

Mr. Rouse: I will say that I understand that our stipulation as to

damages still controls and I don't offer this deposition on the question of damages.

Mr. Hewitt: I know you don't, but the trouble is it was taken just for the question of damages at that time and did not open up the whole case that now is opened up. Counsel for the appellant-respondent may after examining the said commission withdraw his objection and if the objections are not withdrawn the wishes also to give notice to the proctor for the appellee that he may move
66 to suppress the deposition taken under the commission.

Mr. Rouse: I offer in evidence the deposition of E. E. Bettinger, the original of which deposition is now on file in the office of the Clerk of the District Court.

Q. Now, Mr. Hansen, attached to the deposition of Mr. Bettinger are the letters or copies of letters and telegrams relating to this order which passed between the libelant and your company and in one or two of these which I now show you, namely, Exhibits 17 and 16, appear the words "orders placed by" and then the name of the libelant with the name of your company "through their representative" Companhia Geral. Can you tell me what that word "representative" means? Is that in a printed form letter that is used?

A. That is in a printed form, yes.

Q. And it refers to the representative of the one placing the order?

A. Yes.

Q. And for use in time when the order is placed for the account of the Brazilian company by one of their agents or someone other than themselves?

A. Yes.

Q. Has the libelant branch offices at various ports in South America such as Montevedio as well as Rio?

A. To the best of my knowledge they had a branch office in Sao Paulo.

Q. Do you know of any other branch—and you are speaking now of 1918 when this order was placed?

67 A. That is the only branch office of Rio that I have ever known of.

Q. Has your company any branch offices in Rio?

A. No, my company has no branch office anywhere.

Q. I have asked you about this branch office because reference is made in one of the cables attached to that deposition of Mr. Bettinger marked Cable No. 3 in which it says "consigned Rio Branch." That is a cable as I understand it from the libelant to you, is it not?

A. Yes.

Q. Do you understand that word "Rio Branch" as used there means the Rio office of the libelant rather than the Sao Paulo office?

A. Yes.

Q. In this transaction concerning this resin with the libelant you shipped this resin down on a straight sale, cost, insurance, and freight, and how did you get your profit,—on the percentage of the invoice?

A. In a way that any merchant figures his profit. We add a certain percentage.

Mr. Hewitt: Objected to unless the witness answers how they did it in this particular case.

The Witness: Do you wish me to state the definite percentage?

Mr. Hewitt: Yes, in this particular case.

Q. In this particular case, Mr. Hansen, did you charge the
68 libelant a profit or did you make it a lump sum price to him?

A. We charged him a profit.

Q. As such?

A. Yes.

Q. That is your usual method of doing business?

A. Yes.

Cross-examination.

By Mr. Hewitt:

Q. What is the amount of freight paid on this shipment of 800 barrels?

A. I can tell you if I may look at the bill of lading (looks at bill of lading) $5,357.14.

Q. What was that based on?

A. As far as I remember, based on the rate of $30. per ton weight or measurement.

Q. Were you acquainted with the freight rates at that time to Rio?

A. Yes, I was.

Q. Is there any difference between cargo carried on deck and under deck?

A. Freight rates were varying just at that time so that is very hard to answer.

Q. Don't you know from the freight rate being $30. that it was lower than the rate under deck?

A. No.

Q. Did you know what the freight rate under deck was?

A. No.

Q. But you had entire charge of this shipment——

A. (Interrupting.) Excuse me. I said I didn't know what the freight rate under deck was but I know what these people quoted us under deck. They quoted us at the rate of $30.

Q. Under deck?

A. Yes.

69 Q. What did they quote you for on deck?

A. The same rate. The contract read on or under deck.

Q. Who made the contract?

A. Through a ship broker.

Q. Do you know their name.

A. M. C. Richards, I think. M. C. Richards.

Q. Is this the copy of the contract?

A. It looks like it.
Q. Have you got a copy of the contract in your files?
A. I don't think we have. I don't know whether we have or not.
Q. Did you ever see the contract?
A. I do not remember. Most likely I did because I have O. K'd the bill of lading for payment. I have O. K'd the payment. The freight was not paid before I put my O. K. on it, so I probably seen that at the time.

Mr. Hewitt: I offer the freight contract in evidence. It is the same as Schedule A annexed to the amended answer as printed on page 11 of the record already printed.

Q. What amount did you add as a profit to this sale?
A. I cannot tell you offhand. You have the invoice there if you want to figure it out.
Q. How do you base the amount?
A. We generally add a certain percentage varying from five to ten per cent.
70 Q. Do you know what amounts were added in this case?
A. No. It may have been more and it may have been less. It all depends on what competition we have which we think we are up against, you see.
Q. Is ten per cent. the highest you ever charge?
A. No, there is no set rule for what we charge. I don't think we ever did charge more but on certain things we might charge even more.
Q. You take all you can get, is that it?
A. No, I would not say that.

Mr. Rouse: I object to that.
The Witness: Not all we can get. We take all that our good business judgment permits us to take. We are not profiteers.

Q. Does the libelant order any goods in the United States through anybody else but your concern?

Mr. Rouse: If you know.

A. Yes, yes, they order from other people. They bought goods here from other people.
Q. In New York?
A. Yes.
Q. What is your relationship with the libelant?

Mr. Rouse: In what way? Objected to, unless you make it more definite.

71 Q. In business?
A. We deal with one another as customers. We represent one another as any buyer and seller make arrangements with one another in different territories. We buy goods from them and they buy goods from us.

Q. And you make a report to your European office, don't you, of all the transactions that take place at this office in New York?
A. No, not a report. How do I understand what you mean by report?
Q. Don't you make a statement to your European office?

Mr. Rouse: I object to that.
The Witness: Do I have to answer that?
Mr. Hewitt: I request an answer.
Mr. Rouse: A statement of what, Mr. Hewitt? Make it plainer.

Q. Of your business transactions?
A. No, we do not make any statement but we send them copies of our invoices. I suppose that is what you might call a statement.
Q. And that is considered your head office, isn't it?
A. It depends on how you take "head office."
Q. Who owns the stock of your corporation?
A. To the best of my knowledge A. S. Detalmindelige Handels Kompagni, Copenhagan, Denmark.

Mr. Rouse: Do you own any stock?
The Witness: No.

72 Q. Whatever stock is in your name you hold for the Denmark office?
A. Yes, sir.
Q. Isn't that true also of the South American concern that it is controlled and owned by the Copenhagen, Denmark, office?
A. Not to my knowledge, no. I have said when you asked me if this Denmark Company owns the stock of the New York Company "I don't know." They may have sold the stock. I have deposited that stock in their name here in the National City Bank and that is all I know of it.
Q. You made reports of this transaction to the Copenhagen office right along, haven't you?
A. No, not right along.
Q. You have made reports then?
A. Yes.
Q. I call your attention to the fact that a Mr. Lee, the Secretary of your corporation, states that the libelant is a sister corporation of yours is that true?
A. What do you understand by a sister corporation?
Q. I am asking you the question?
A. Well, it depends on what you understand by a sister corporation. We call them between ourselves, our sister company.
Q. Because it is controlled through the Copenhagen office, isn't that it?
A. No.
Q. Why do you call it?
A. Because we act with one another in this big organization which we all belong to.
Q. That is, the big corporation that you all belong to is the Copenhagen office?

A. That is in Copenhagen that we all co-operate with.

73 Q. Does the Copenhagen office share in the receipts as a stockholder of the New York corporation?

A. It would when the profits were declared naturally as any stockholder would.

Q. And doesn't it also share in the profits of the South American corporation, the libelant.

Mr. Rouse: Objected to.

A. I do not know anything about that at all.

Q. Aren't you instructed from Copenhagen to give them all the business you can.

A. To give who,

Q. The libelant?

A. Well, we are not instructed by anybody to give all the business we can anywhere. We naturally do. That is what we are here for.

Q. To give them the business?

A. To give them as well as any of our customers or connections to give and get.

Q. In connection with this purchase of resin for the libelant you were told to get out marine and war insurance?

A. We were told?

Q. Yes, by cable, weren't you?

A. No, we were not told to get out special insurance. We made a C. I. F. sale and that in itself embodies that the sellers cover with insurance.

Q. And you say you did cover this by insurance?

A. We covered with insurance, yes, sir.

Q. Did you ever get a dock receipt for this resin when it was delivered?

A. Undoubtedly.

Q. Have you got a copy of the dock receipt in your file?

A. No, the dock receipt is returned to the steamship office

74 in exchange for the bills of lading.

Q. Do you remember what the dock receipt said?

A. The dock receipt said the same as the bill of lading says. It is supposed to say that and it undoubtedly did.

Q. Did it say anything as to where the cargo was to be stowed on board the vessel?

A. I don't know.

Q. You don't remember?

A. I don't remember.

Q. Did you examine it when it went to your office?

A. Undoubtedly.

Q. You have no recollection of what it stated?

A. No, it is three years ago since I saw it.

Q. When did you take out the insurance on this resin shipped on the St. John's?

A. To the best of my knowledge we proceeded in this transaction

as we always did during those times. When we had engaged the freight we covered insurance. We took out a binder for insurance through our insurance brokers. Insurance was very difficult to obtain at that time and we had to provide for that the same way as we had to provide for freight space. The insurance companies only would take a limited amount on each boat so we had to get in on time.

Q. When did you take out your binder?

Mr. Rouse: That is objected to. You can answer if you have any personal knowledge of it.

75 A. On or about the same date as the freight contract.

Q. Do you know whether you showed your freight contract to the insurance company?

Mr. Rouse: That is objected to.

The Witness: Shall I answer it?

Mr. Rouse: Yes.

A. No, I do not know.

Q. Your best recollection is that you simply ordered insurance for 800 barrels of resin to be shipped on the St. John's?

Mr. Rouse: That is objected to.

A. Yes.

Mr. Hewitt: I offer the original in evidence.

Mr. Rouse: Excluding the red ink.

Mr. Hewitt: Yes, except the red ink notations.

Mr. Rouse: Being the same document marked as No. 16 in the deposition as Bettinger heretofore referred to.

(Document referred to marked Appellant's Exhibit 1).

Q. Are these the dock receipts? (Handing papers to witness.)

A. They look like copies, anyway.

76 Q. Were they copies of the dock receipts that were given you to the best of your recollection?

A. I cannot say. One is not even signed by the company.

Mr. Rouse: If you state that they are copies, Mr. Hewitt, why, we won't contest it.

Mr. Hewitt: All right. I will offer that in evidence.

Mr. Rouse: You offer these as copies?

Mr. Hewitt: Yes.

(Documents marked Exhibit 2A and Exhibit 2B).

Mr. Hewitt: Counsel for the claimant-appellant states that he does not know where the originals are, that he has not the originals and that these are carbon copies.

Q. Who is Mr. Holst connected with your office?

A. Mr. Holst was connected with our office as Manager of our Chemical Department and at that time functioning also as Traffic Manager.

Q. You made a claim, didn't you, on the owner of the Schooner St. John's on behalf of your corporation for this resin jettisoned on the steamer St. John's?

A. I don't remember.

Q. Didn't you write letters stating that?

A. Well, if you have anything that I can refresh my recollection.

77 Q. I am asking you?

A. I don't remember that we did it.

Q. I ask you whether you wrote that letter of December 11th? (Handing letter to witness.)

A. Yes.

Mr. Hewitt: I offer that in evidence with the annexed bill.

Mr. Rouse: I object to that as immaterial, incompetent and irrelevant.

Mr. Hewitt: I offer both the letter and the memorandum bill attached, which is referred to in the letter.

(Documents marked Appellant's Exhibit 3A and Exhibit 3B).

Q. I ask you whether you wrote that letter which I hand you, dated February 7th, 1919?

A. Yes, sir.

Mr. Hewitt: I offer that in evidence.

Mr. Rouse: That is objected to on the same grounds.

(Letter marked Appellant's Exhibit 4).

Q. I ask you whether that is a letter from Mr. Holst to Messrs. Johnson & Higgins, under date of December 23, 1918?

A. Yes, sir.

Mr. Hewitt: I offer that in evidence.

Mr. Rouse: That is objected to on the same grounds.

(Letter marked Appellant's Exhibit 5).

78 Q. Were these letters written by Mr. Holst under your direction?

A. Yes, sir.

Q. You were making a claim then for your company at that time against the owner of the Schooner St. John's?

A. No, we were making a claim in our name for the libelant in this case here.

Q. You didn't state so in your letter, did you?

Mr. Rouse: Objected to. The letter speaks for itself.

A. I don't know if it is stated in any of the letters. (Examines letters.) We evidently didn't state anything in the letter but that

is quite ordinary that we make claims for our customers and we always do it in our own name. We never mention that it is on behalf of this party or that party.

Q. You state in your letter "our claim"?

A. Yes, we were handling it, and it is our file as far as that goes, as far as talking about it is concerned.

Q. Have you received any letters from the libelant requesting a return of the amount which they paid you on the draft which you drew against this shipment?

Mr. Rouse: That is objected to as immaterial and irrelevant and not binding on the libelant.

79 A. I don't remember.

Q. You don't remember?

A. No.

Q. Have you received any correspondence from the libelant regarding this shipment?

A. Yes, we undoubtedly have been requested to return the money that they have paid us. As is usual they insisted that we should attend to the collection and so on. They have been very impatient with the delay.

Q. You knew when the freight contract was made that the ship had the option of putting the resin on or under deck?

A. Yes, sir.

Q. Did you ask the agent of the ship or anybody else to notify you whether it was put on deck?

Mr. Rouse: That is objected to as immaterial and not binding on the libelant.

A. I don't know at this time whether we asked them, but they were naturally supposed to notify us.

Q. That is what you thought that they would notify you if they put it on deck?

A. Yes, certainly we thought it.

Q. You didn't make any effort to find out whether it was shipped on deck or not, did you?

Mr. Rouse: That is objected to as not binding on the libelant and as incompetent, irrelevant and immaterial.

80 A. I can't remember at this time whether we made any effort but it is the custom of the trade——

Mr. Hewitt: I move to strike out the rest of the answer as the question has been answered.

Q. Then, as I understand you, the binder for this insurance was taken out under the freight contract?

A. It was taken out under——

Q. (Interrupting.) Under the freight contract?

A. What do you mean by that?

Q. You said at that time you took the binder?

A. What do you mean by the binder was taken out under the freight contract?

Q. That is all you had at that time. You said it was taken out at the time the freight contract was made?

A. I don't know what you mean by the binder was taken out under the freight contract.

Q. Wasn't that the only document you had at that time?

A. Yes, but the two things haven't necessarily anything to do with one another. Very often we cover insurance without any freight contracts.

Redirect examination.

By Mr. Rouse:

Q. You did not, in fact, get your credit insurance until after the bill of lading had been issued, did you?

A. No.

81 Q. What you referred to as your binder was a previous negotiation to secure arrangements for insurance on short notice. Is that what that was?

A. Yes.

Mr. Hewitt: Object to the question as being leading.

Q. Is it a fact that you had to speak for insurance at that time well in advance of the date that you wanted it, to get it?

A. Yes.

Mr. Hewitt: I object to counsel's question as leading.

Q. Could you have insured the shipment of resin on deck had you known that it was going on deck actually?

A. Undoubtedly.

Q. Did I understand you to testify that the dock receipts are given to you with the bill for the goods and then are delivered by you to the steamship agents in exchange for the bill of lading?

A. That was the case in this instance, yes, sir.

Q. Reference has been made to a Europeon office, mentioned as your European office. Is that a branch office of your company or is it an independent corporation?

A. It is an independent corporation.

Q. Do they exercise any business control over your operations here in your matters of business discretion, the conduct of your affairs at New York in your corporation?

A. Not legally, but we co-operate with one another and

82 sell to one another and decide together.

Q. But your New York corporation does business with other firms than the Danish company that you have just referred to and the libelant in this case, do they not?

A. Yes, sir.

Q. Do I understand in your answer to a question in the cross-examination as to how you dealt with the libelant in this action, that you dealt with them as customers?

Mr. Hewitt: Objected to as leading.

A. Yes.

Q. Did you deal with them as customers the same as you deal with any other concern?

A. Yes.

Mr. Hewitt: Objected to as leading.

Recross-examination.

By Mr. Hewitt:

Q. Who obtained the bill of lading from the agents of the Schooner?

A. Probably an office boy.

Q. Under the order you received from the libelant for this shipment you were supposed to take out marine insurance, isn't that true?

A. Not under the order we received from the libelant, but under the usual customs of a C. I. F. sale.

Q. But the order was a C. I. F. contract, wasn't it?

A. Yes, sir.

83 Q. And therefore under the C. I. F. contract you were to obtain marine insurance on the shipment?

A. Yes, sir.

Mr. Rouse: Did you procure full marine coverage for an under-deck shipment?

The Witness: Yes, sir.

Deposition concluded.

84 *Testimony of Victor Hansen, a Witness on Behalf of the Libelant-Appellee, Recalled on June 13th, 1921.*

VICTOR HANSEN, recalled:

Recross-examination.

By Mr. Hewitt:

Q. Do you remember seeing these dock receipts covering this shipment, the originals?

A. I don't remember having seen them.

Q. You don't know whether they were ever turned over to W. S. Kimball & Co., do you?

A. I am practically positive they were.

Mr. Hewitt: I move to strike out the answer.

Q. I ask you do you know whether they were turned over to W. S. Kimball & Co.?

A. I know that we paid freights against these dock receipts and

we always have to deliver dock receipts to the steamship compan to get our bill of lading.

Q. That is the custom, is it?

A. Yes.

Q. I want to know—again I am asking you this specific ques tion—whether you remember these dock receipts being returned t W. S. Job & Co.?

85 Mr. Rouse: You mean these in evidence or the originals?

Mr. Hewitt: The originals.

A. That is three years ago that this took place I don't personall remember one way or the other therefore.

Q. You said in your deposition taken on June 1st that the libellan in this case had written you for the money under this shipment, i that so?

A. Yes.

Mr. Hewitt: I call for the production of the letters sent by libellan to you.

Q. Will you produce them here?

A. I will try to produce them.

Mr. Hewitt: I also call upon proctor for libellant for all letter written by the shipper General Commercial Company of the Unite States to the libellant.

86 *Testimony of Victor Hansen, a Witness on Behalf of th Libelant-Appellee, Recalled on June 15th,* 1921.

VICTOR HANSEN, recalled:

Recross-examination.

By Mr. Hewitt:

Q. I asked you at the last hearing to look up for me the letter and correspondence you had with the libellant in this case; hav you done so?

A. Yes.

Q. Have you found the correspondence?

A. Yes.

Q. Have you got it here?

A. Yes, sir.

Q. May I see that correspondence?

Mr. Rouse: That is objected to as improper; these letters are pr duced under objection.

A. I am giving Mr. Hewitt these letters with the understandin that everything contained in the letters pertaining to other matte are not to be considered.

Mr. Hewitt examines the papers.

Q. Mr. Hansen, I see in a letter from the libellant, under
87 date of September 19, 1919, directed to your company, that libellant says they will refer the dispute to director Andersen; who is director Andersen?

A. He is one of the directors of A/S Det Almindelige Handels Kompagni, Copenhagen.

Q. That is the parent company of these two organizations, the libellant and your company, isn't it?

Mr. Rouse: Objection to the question as a designation.

A. What do you mean by parent company?

Q. It is the company that you have transferred by their direction all the stock of the General Commercial Company Limited of the United States that is in your name and left with the National City Bank?

A. Yes.

Q. Have you ever had this matter up with Mr. Andersen?

A. Yes.

Q. Did he instruct you what to do in the matter?

A. No.

Q. Did he give you any advice as to how it should be handled?

A. No.

Q. Did you ask him how this matter was to be handled at all?

A. No.

Q. Did you ask him to give any instructions to the libellant as to how the matter should be handled?

A. No.

Q. Do you remember what was said in your conversations with Mr. Andersen regarding this shipment?

88 Mr. Rouse: Objected to.

A. I don't remember what was said, but I discussed this matter with Director Andersen in the same way as I have discussed it with so many business friends and acquaintances.

Q. But nothing in relation to the way it should be handled?

A. No, that was left entirely—that is entirely within my own judgment.

Mr. Hewitt: I offer in evidence so much of the letter of December 3, 1918 from the libellant to the General Commercial Company, Ltd. of the United States as refers to the rosin in question.

Mr. Rouse: Objected to.

It will be referred to as Claimant's Exhibit 9 and reads as follows:

"The main reason for this large balance in our favor is the fact that we have charged to you the amount by which you insured the 800 barrels of rosin K shipped by the S/V St. John's N. F., viz. $23,200 * * *."

Mr. Hewitt: I offer a copy of a cable from libellants to General Commercial Company, Ltd., which is noted as having been received 3/21/19.

Mr. Rouse: I ask that the whole cable be offered.

It will be referred to as Claimant's Exhibit 10 and reads as follow

89 "Cement 180 kilos barrels rosin K soda ash epsom sal bicarbonate of soda what is price (of) price cost freight insurance at present soda silicate—quote price cost freight & insu ance stop rosin—St. John must be remitted are in great need—i properly protected should be no further delay if not protected you fault cannot wait (until) suit will be settled."

Mr. Hewitt: I offer a letter from the General Commercial Com pany Ltd. of the United States to the libellant under date of Januar 9, 1919, so much of the same as refers to the shipment of rosin t the St John.

It is marked Claimant's Exhibit 11.

Mr. Hewitt: I offer letter of the libellant to the General Comme cial Company of the United States under date of March 22, 1919.

Mr. Hewitt concedes that the objection taken to the first letter ap plies to all the letters and cables offered by him on this hearing.

Mr. Hewitt: I offer in evidence letter from the libellant to the Ge ral Commercial Company of the United States, under date of Augus 7, 1919.

It is marked Claimant's Exhibit 12.

Mr. Hewitt: I offer in evidence letter from libellant to th
90 General Commercial Company of United States under date o September 19, 1919.

It is marked Claimant's Exhibit 13.

Re-redirect examination.

By Mr. Rouse:

Q. You produced other letters, did you not, which you showed t Mr. Hewitt?

A. Yes.

Q. I show you this letter; is that one of the letters referring to thi subject?

A. Yes.

Mr. Rouse: I offer that in evidence, without prejudice of cours to my objections to the testimony already offered by Mr. Hewitt.

Mr. Hewitt: I make a general objection that any letters betwee the libellant and the General Commercial Company Ltd. of the Unite States are not admissible, as they are not binding in any way o this claimant.

Mr. Rouse: That applies to those you have offered also, Mr Hewitt?

Mr. Hewitt: No, those that Mr. Rouse offers.

It is marked Libelant's Exhibit C.

Q. I show you this cable, Mr. Hansen, and ask you if that is on of the papers referred to?

A. Yes.

91 Mr. Rouse: I offer that in evidence (referring to cable from Hansen to Bechtinger).

It is marked Libellant's Exhibit D.

Q. Is this a cable from you to the libellant?
A. Yes.

Mr. Rouse: This cable referred to as Libellant's Exhibit D reads as follows, when translated from code: "Rosin claim cannot remit until have collected * * *."

Q. Was that in reply to a request from the libellant to remit the amount of the claim?
A. Yes.
Q. I show you another cable, what is that?
A. This is a cable from Rio to us.

Mr. Rouse: I offer this in evidence.

It is referred to as Libellant's Exhibit E and reads as follows:

"Castor seed are shipping saga on deck shipment this month attending to insurance rosin K St. John documents will be forwarded by next mail saga may we draw on you for $23,200 ninety days immediate answer required."

Mr. Hewitt: Counsel for claimant wishes to state on the record that his objection applies also to the cables offered by Mr. Rouse, as well as the letters.

92 Mr. Rouse: I offer in evidence letter from libellant to General Commercial Company New York dated Rio December 19, 1918 with exhibits attached.

It is marked Libellant's Exhibit F.

Q. I believe you testified on direct examination that you had not repaid the amount of this draft to the libellant in this case; is that correct?
A. Yes.
Q. And that is the sum that is referred to in these letters as sending a bill for the shipment on St. Johns N. F.?
A. Yes.
Q. Debiting your account, etc.?
A. Yes, we refused to accept that debit.
Q. And was your refusal subsequently accepted by the libellant and the matter dropped?

Mr. Hewitt: Objected to as not binding on the claimant.

A. Yes, we acted purely for them.
Q. Did you act as principals for them?
A. Yes, in the deal we acted as principals.
Q. You have never given the libellant credits or balances on ac-

count or anything of that sort whereby the refund of this money was effected?

A. No refund has been made.

Re-recross-examination.

By Mr. Hewitt:

Q. Have they given you anything in writing to show that
93 they dropped this claim against your company?

A. I couldn't say, I don't remember.

Q. None of these letters here that you have produced today show that they have given you anything in writing, do they?

A. I think some of the letters do.

Q. Will you show me any of them, please?

A. All these letters from Rio merely indicate what was the intention, that it was their intention to draw on us and they throughout made an attempt to have us pay them before we had collected the amount for their account.

Mr. Hewitt: I object to the answer as not being responsive and simply as a conclusion of the witness from reading the letters which do not bear him out.

A. (continued). Rio's letter to us of December 8th, specifically states that they have asked us to remit to them by telegraph as soon as we have collected the amount involved.

Q. December 8th, what year?

A. 1918, and several of the letters will bear out the same position and in our letters to them we have always refused——

Q. Disclaimed liability?

A. Yes.

Q. But you have no other except those produced here today?

A. No.

Q. Under the order that you received from the libellant for this rosin, you were their agent to make the shipping arrangements; is that what you mean to say?

94 Mr. Rouse: Objected to as calling for a conclusion.

A. We made a c i f sale to them, which means that we sell them the goods and undertake to put them on board the steamer and turn over to them certain documents, all of which we did.

Q. So that if you made arrangements to ship on deck, you had that right under the order given you, isn't that true?

A. Yes, I suppose so, provided we simultaneously covered the insurance according.

Q. Well, under the freight contract you gave the ship the right to ship the rosin on deck, didn't you?

A. The freight contract read "on or under deck, ship's option."

Q. So that you entered into an agreement with the ship that it could be put on deck?

A. Yes.

By Mr. Rouse:

Q. Mr. Hansen, did the libellant in this case make a demand on you for the payment of this sum mentioned in the correspondence irrespective of whether you collected the recovery or not?

Mr. Hewitt: Objected to, as the correspondence shows for itself.

A. Not to my knowledge.

Q. Is that your understanding of their claim and debit, that
95 you were to stand this loss irrespective of the recovery, or that you were to remit on recovery or if possible advance?

A. No——

Mr. Hewitt: I object to the witness's understanding.

A. (continued). —we have the same as mostly everyone of our customers always leaves or tries to leave the collection of claims to us and try to pass on to us debit notes at once, which we automatically refuse to consider and simply undertake to do our best for them.

Q. In other words, it is an effort to have you advance to them the money and carry the bag?

Mr. Hewitt: I object to the question as irrelevant, incompetent and immaterial.

A. Yes.

Q. When this freight contract to which Mr. Hewitt has made reference was submitted to you, was anything said to you at that time that the shipment would surely go on deck, other than the clause in the freight contract that the ship had the option to place it either on deck or under deck?

A. No, my understanding was——

Mr. Hewitt: I object to the witness's understanding.

A. (continued).—that the rosin would go under the deck. As is always the case, we try to ship only under deck but at times
96 we permit shipment of certain goods on deck and then naturally expect to be properly notified which option in our freight contract is made use of by the steamship company.

Mr. Hewitt: I object to the answer as unresponsive.

Q. Your information then in this case was that it would go either on deck or under deck, at that time undetermined?

Mr. Hewitt: I object to the question as incompetent, irrelevant and immaterial.

A. Yes.

Q. Were you ever informed prior to the actual sailing of the St. John's N. F. that your shipment was actually laden on deck?

A. No, neither before or after, until we heard that the goods had not arrived at destination.

Q. Did you then investigate?

A. We then investigated.

Q. That is how you obtained the information?

A. Yes.

Mr. Rouse: I offer in evidence letter of libellant to General Commercial Company of United States, dated December 8, 1918, to which I referred before.

Mr. Hewitt: Objected to on the ground that correspondence between the libellant and General Commercial Company is not binding on the claimant.

It is marked as Libellant's Exhibit G.

97 *Testimony of Alexander Holst, a Witness on Behalf of the Libelant-Appellee, Taken on August 19th, 1921, at Stockholm, Sweden.*

Interrogatories.

1. State whether or not you were employed by or connected with the S. A. Companhia Geral Commercial Do Rio Janeiro, the libelant in this action, during the month of June, 1918.

Answer: No.

2. (*a*) State whether or not you were employed or connected with the General Commercial Company, Ltd., of U. S., at New York, during the month of June, 1918.

Answer: Yes.

(*b*) If you state that you were so connected, state in what capacity; whether your office was in New York City, and the general nature of your duties.

Answer: I was Traffic Manager of that concern; the office of which was in New York City. Traffic Manager as stated.

3. State whether you recall the sale and shipment of Eight Hundred (800) barrels of Rosin K. by the General Commercial Company, Ltd., of U. S. to the libelant in this action, the S.
98 A. Companhia Geral Commercial Do Rio De Janeiro, at Rio, during June, 1918, and shipped on the Schooner "St. John's, N. F.".

Answer. Yes.

4. If you state that you do recall the said shipment, state—

(*a*) Whether you had anything to do with the said shipment; if so, state what you did in respect to it.

Answer. I had to arrange the freight, book it and make the usual arrangements in such cases. I also bought the goods.

(*b*) State whether you received the dock receipts for the said shipment; if so, state whether they bore any notation to the effect that the shipment was placed on deck of the said schooner.

Answer. I received the dock receipts for the shipment referred to, but they did not bear any notation to the effect that the shipment was placed on the deck of the said schooner.

(*c*) State whether your broker or anyone else at any time prior to the sailing of the schooner "St. John's, N. F.," informed you that your shipment had actually been placed on deck for the trip.

Answer. No, neither the broker nor anyone else prior to the sailing of the Schooner informed me that the shipment had actually been placed on deck.

99 5. (*a*) State whether you received the Bill of Lading issued to cover the said shipment.

Answer. Yes, I received it.

(*b*) If so, state whether it bore any notation to the effect that the shipment was placed on deck of the said Schooner.

Answer. No, it bore no such notation.

6. Examine the copy of a letter, dated December 11th, 1918, from the General Commercial Company, Ltd., of U. S. to the W. S. Job, Inc., previously marked in evidence as appellant's "Exhibit 3-A;" hereto attached as "Exhibit A," and state:—

(*a*) Whether you signed the said letter.

Answer. I have examined the letter referred to and remember having dictated it, but whether I signed it or whether the President of the company I cannot remember.

(*b*) When, in what condition and how you learned that the shipment of 800 casks of Rosin K., referred to therein, had been shipped on deck.

Answer. My recollection is that my first knowledge that the shipment had been placed on deck was through a cable received from the S. A. Companhia Geral Commercial Do Rio De Janeiro.

(*c*) Did you know, or hear, at anytime prior to the actual sailing of the Schooner that your said shipment of Rosin K. was placed on deck.

Answer. No, I heard nothing to that effect.

100 7. State from what source and in what manner you obtained the information as to the shipment being loaded on deck, stating whether the information came from the vessel or its agents or came from the Rio office of the libelant herein, or as a result of your investigations after the libelant had reported its non-arrival.

Answer. The first information I had was from a cable from the office of S. A. Companhia Geral Commercial Do Rio De Janeiro without any investigation whatever on my part. I received no information from the vessel or its agents.

8. Did the marine insurance placed by you cover all risks of an underdeck shipment?

Answer. Yes, it covered all risks of an underdeck shipment.

Cross-interrogatories:

1. By whom are you employed, or with whom associated, at the present time, and in what capacity?

Answer. Chokladfabriken Marabou Aktiebolag.

2. Is your present employer or associate or associates connected in any way with the General Commercial Co., Ltd., of United States, or S. A. Companhia Geral Commercial Do Rio De Janeiro or A. S. Oetalmindelige Handels Kompagni of Copenhagen, Denmark or any two or all three of them? If so, please state in what way.

Answer. No, no connection whatever.

101 3. Is it true that you were acting as Manager of the Traffic Department of the General Commercial Co., Ltd., of United States in June, 1918?

Answer. Yes.

4. As Manager of the Traffic Department of that company, otherwise, did you O. K. for payment the freight bill on the 8 bbls. of rosin that are the subject of this suit?

Answer. Yes, I O. K'ed the bill for payment.

5. If you have answered the fourth cross-in-terrogatory in t affirmative, please state.

(*a*) When it was that you O. K'ed the bill for payment;

Answer. I cannot state when I O. K'ed the bill, but it was befo the receipt of the cable from the S. A. Companhia Geral Commerci Do Rio de Janeiro.

(*b*) Whether or not you saw the freight contract, copy of whic is annexed to these cross-interrogatories, marked Exhibit "I," befo O. K'ing the freight bill.

Answer. Yes, I saw the freight contract, copy of which I hav just examined before O. K'ing the freight bill.

6. Please state to the best of your knowledge whether you fir saw the freight contract, dated June 6, 1918, on that date; if no please state on what date.

102 Answer. I cannot remember the exact date on which saw the freight contract for the first time.

7. Please state just what procedure was followed in the office o the General Commercial Co. Ltd., of United States in the approv of this freight bill for payment, stating the names of all perso through whose hands it went, and the order in which it went t these different persons.

Answer. The freight bill came to me first; I examined it; O K'e it; sent it to Mr. Vilstrup of the bookkeeping department, in orde that check may be made out; after which, following the usual orde of business, the check and bill went to the President, Mr. Victo Hansen, as he had the bill before him when signing the check.

8. Was it you who arranged with M. C. Richards or his repre sentatives to get space for these 800 barrels of rosin? If not, wh in the office of the General Commercial Co., Ltd., of United State did make the arrangements?

Answer. Yes, it was I who arranged with Richards for space fo the 800 barrels of rosin.

9. If you have stated that it was you, please state also what in structions you gave Mr. Zeller or M. C. Richards or anyone repre senting the latter regarding the shipment.

Answer. Did not you give any instructions to the shipbroker I gave the dock receipts to the suppliers to deliver the goods at th docks.

103 10. Do you know Charles Zeller, who signed the freigh contract, dated June 6, 1918?

Answer. Yes, I know him.

11. When did you first see him or talk to him or see or talk t anyone representing M. C. Richards regarding the shipment of thes 800 barrels of rosin or any part of them?

Answer. I do not remember the date, but undoubtedly I took th matter up with Richards as soon as we had received the order fo

these 800 barrels of rosin from S. A. Companhia Geral Commercial Do Rio De Janeiro.

12. How many times prior to June 19, 1918, (the date on which the Schooner "St. John's, N. F.," sailed) did you see or talk to Mr. Zeller or anyone representing M. C. Richards in connection with this shipment?

Answer. I do not remember how many times I saw or talked with Mr. Zeller.

13. Is *is* true that Mr. Zeller showed you the freight contract dated June 6, 1918, before presenting it to W. & S. Job & Co., the ship's agents, for their signatures.

Answer. I cannot remember in this particular instance, but such procedure was not the practice of these shipbrokers.

14. Mr. Fox of the Job Shipping Corporation has testified that it was on June 5, 1918—the day before the date on the freight
104 contract—that Mr. Zeller first talked to him about securing space on the St. Johns, N. F. for these 800 barrels of rosin. Did Mr. Zeller tell you, following that conference, that Mr. Fox had said that there would not be room for this shipment under deck?

Answer. Mr. Zeller never told me that there would not be room for the shipment under deck.

15. Did Mr. Zeller talk to you at all on June 5, 1918, about his conference with Mr. Fox on that day?

Answer. No, he did not.

16. Did you see Mr. Zeller talking to Mr. Hansen, president of the General Commercial Co., Ltd., of United States on that day?

Answer. No.

17. Did you arrange for the insurance on these 800 barrels of rosin; if not, who in the office of the General Commercial Co. Ltd., of United States, did?

Answer. I do not remember, and I do not remember who arranged this insurance.

18. What documents were shown to the underwriters at the time the insurance was taken out?

Answer. Probably no documents were shown to the underwriters as the company had a general policy with the underwriters.

19. Please state just how arrangements for the insurance were made, whether directly or through a broker, and whether by
105 written communication, telephone conversation or personal talk.

Answer. I do not remember in this particular case just how arrangements were made, but the general rule of the office was that insurance was made through an insurance broker, but whether by written communication, telephone conversation or personal talk I cannot say in this particular case.

20. Please state to the best of your knowledge what day it was that you or the General Commercial Co., Ltd., of United States first did anything regarding the taking out of insurance on this shipment, or any part of it?

Answer. It is impossible for me to state any date.

21. Please state the date on which the policies or certificates of insurance were obtained by you or the General Commercial Co., Ltd., of United States?

Answer. I cannot remember the date on which the policies or insurance were obtained.

22. When was the insurance "binder" obtained by you or the General Commercial Co., Ltd., of United States?

Answer. I do not remember.

23. Is it not a fact that you dictated and/or signed a letter or letters making demand upon the underwriters for $23,200 in
106 connection with this shipment?

Answer. I do not remember.

24. Is it not a fact that you dictated and/or signed a letter on behalf of the General Commercial Co., Ltd., of United States, making a like demand upon Messrs. W. & S. Job & Co., agents for the St. Johns N. F. Shipping Corporation, and enclosed therein the debit note of the General Commercial Co., Ltd., of United States for $23,200?

Answer. I remember having dictated such a letter but cannot be sure whether I signed it or not.

25. Was the freight contract dated June 6, 1918, in the possession of the General Commercial Co., Ltd., of United States, before the insurance on this shipment was effected?

Answer. I cannot remember, but my common sense would tell me that such was the case. We could not place any insurance on a shipment for which we had not booked any freight.

26. After you first saw the freight contract, dated June 6, 1918, did you ask Mr. Zeller or anybody else to notify you whether the rosin was put on deck or under? If so, please state whom you asked, and when?

Answer. I do not remember.

27. Did you do anything to find out whether the shipment was placed on deck or under, and if so, what?

Answer. I do not remember.

107 28. Is it a fact that at the time you took out the insurance binder on this shipment the only document you had pertaining to the shipment was the freight contract.

Answer. I do not remember in this particular case.

29. If you have answered the twenty-eight- cross-interrogatory in the negative, please state what other documents you did have.

Answer. Already answered.

30. The bill of lading being dated June 12, 1918, is it a fact that the General Commercial Company, Ltd., of United States did not obtain it until after the insurance binder on the shipment had been delivered to the company or someone authorized to act for it?

Answer. I do not remember.

31. Under date of February 11, 1919, The General Commercial Co., Ltd., of United States wrote to S. A. Companhia Geral Commercial Do Rio de Janeiro referring to a previous letter from the United States company to the South American Company that gave the South American company, to quote from the letter of February

11, 1919, "the impression that the insurance had not been adequately covered by the United States Company." Was it you who dictated and/or signed the previous letter referred to in the letter of February 11, 1919?

Answer. I do not remember such a letter.

108 32. Was the beginning of this business a cable which the General Commercial Company, Ltd., of United States received from the libelant asking the United States company to cable the cost of rosin c i. f.; if not, please state what was.

Answer. I do not remember.

33. Did you or the General Commercial Co., Ltd., of United States then make inquiries as to what such a shipment would cost and cable the Brazilian company?

Answer. See previous answer.

34. Did you subsequently purchase the rosin to send to them and arrange for its shipment and insurance.

Answer. Yes, I purchased the rosin and arranged for its shipment, but I cannot remember about the insurance.

35. Did you receive a percentage commission for so doing.

Answer. No, I did not.

36. State also, if you know, the insurance company or companies which insured the shipment above referred to.

Answer. No, I do not remember their name.

37. In the letter of December 23, 1918, to Messrs. Johnson & Higgins, annexed to the deposition of Mr. Victor Hansen, as Appellant's Exhibit 5, and signed "The General Commercial Co. Ltd., of U. S. Alex. Holst" is this expression: "We may mention

109 that we are in receipt of a cable from our branch house in Rio de Janeiro to the effect that none of the bills of lading in their possession show that the goods have been shipped on deck." Please give the full name of the branch house referred to.

Answer. The full name of the company is "S. A. Companhia Geral Commercial Do Rio de Janeiro," which by the General Commercial Company, Ltd., of the United States, usually was called "branch house" although it was an independent company.

38. Do you recall having called at the offices of Haight, Smith, Griffin and Deming, (then known as Haight, Sanford & Smith) 27 William Street, on January 28, 1919, in connection with this case?

Answer. I do not remember.

39. Do you recall that on that same day Mr. Webster of Haight Sandford & Smith called at your office and you showed him the two insurance policies covering this shipment?

Answer. I remember a representative of Haight Sandford & Smith one calling on our office and that I showed him the two insurance policies covering the shipment referred to, but I cannot remember the date.

40. Do you recall that both of these policies were dated June 10, 1918, and the policies themselves stated that they were effective from June 8, 1918?

Answer. I do not remember the dates.

110 41. Would you swear that they were not so dated?

Answer. I have already said that I do not remember t
dates.

42. Would you swear that they did not state they were effecti
as from June 8, 1918?

Answer. I cannot swear for I cannot recall the dates.

43. Please state, to the best of your recollection, when the polic
were dated and what they said as to the date when the insurance
came effective.

Answer. I cannot remember any of the dates as I have alrea
stated.

44. Is it not a fact that the 800 barrels of rosin that are the s
ject of this suit were insured by two policies, one of the Insura
Company of North America, the other of the Continental Insura
Company?

Answer. I do not remember the names of the insurance com
nies, but I know the shipment was insured to include war and mar
risks.

45. Will you swear that this was not the fact:

Answer. I have stated that I cannot remember the names of t
companies.

46. Is it not a fact that each of said policies contained a cla
(clause 7) "including all liberties as per contract of affreig
ment"?

111 Answer. I do not remember the particular clause of t
policies.

47. Would you swear that the policies did not contain such
clause?

Answer. I do not remember this particular clause.

48. Was not the freight contract dated June 6, 1918, shown
the time the insurance was placed?

Answer. I do not remember the special case, but it was not
custom to show the freight contract when placing the insurance.

49. Please annex to your answers to these interrogatories all w
ten communications, including memorandum or memoranda
statement or statements that you received from the General Comm
cial Company, Ltd., of United States and or any of its officers
or employees and or Messrs. Crowell and Rouse and or anyone c
nected with the latter firm, pertaining to any of the matters refer
to in these interrogatories and or cross-interrogatories.

Answer. I am handing to the Commissioner all such communi
tions as are referred to in the question.

(The letters are marked Exhibits 14 and 15).

112 *Testimony of Charles R. Zeller, a Witness on Behalf of the Libellant-Appellee, on September 9th, 1921, at New York City.*

CHARLES R. ZELLER, a witness called on behalf of libelant-appellee, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rouse:

Q. What is your name?
A. Charles R. Zeller.
Q. During June of 1918 were you connected with M. C. Richards?
A. Yes, sir.
Q. Freight brokers and contractors?
A. Yes.
Q. I show you a document purporting to be a copy of a freight contract heretofore referred to as Schedule A annexed to the answer and appearing at page 11 of the printed record and page 3 of the testimony of John R. Fox taken by deposition June 13, 1921; and I ask you if you are the Mr. Zeller whose name appears at the foot thereof (handing paper to the witness)?
A. I am.
Q. And are you the Mr. Zeller who handled that booking of eight hundred barrels of rosin on the Schooner St. John N. F., which is the shipment involved in this suit?
A. I am.
Q. It has been testified heretofore by Mr. Fox that when you arranged this booking it was stated that the shipment was
113 to be on deck only, the said witness testifying on page 4 as follows: "I called his attention to the clause in the contract, 'on or under deck ship's option' when he was present, telling him that there was no question about it being on deck for shipment." I ask you whether at the time you booked this freight that arrangement was so made?

Mr. Webster: I object to the question as being leading and improper in form.

Q. Just answer Yes or No.
A. Well, he did make some kind of a remark that it might have to go on deck—which was whether we were willing to ship.
Q. I show you this document or freight contract and call your attention to this clause "on or under deck ship's option" which is typed in there; that is the clause referred to (handing paper to the witness).
A. Yes.
Q. Was that typed in at the time this contract was drawn up?
A. Yes.

Q. Will you tell us the circumstances of the presence of th clause?

A. The presence of that clause was when we went over there arrange booking on this eight hundred barrels of rosin we tried get under deck shipment so as to save on the insurance rate. A that time Mr. Fox could not state whether he could handle t entire eight hundred barrels under deck and that he would reser option of shipping it on or under deck, and owing
114 that we put that clause on the contract, and then this co tract was accepted and the steamship permit issued.

Q. Was any objection made by Mr. Fox to the presence of th clause on the contract?

A. No, sir, because if there was he would not have accepted it.

Mr. Webster: I object to the answer and move to strike it out.

Q. And the contract was then signed and accepted by him?

A. Signed and accepted by Fox and permit issued.

Q. And you delivered those to the shipper?

A. Yes, I delivered those to the shipper.

Q. And did Mr. Fox or anybody on behalf of the ship at a time notify you that this shipment was on deck?

A. No, sir.

Q. And did they at any time subsequent to the signing of th contract notify you that the shipment could not in any event under deck?

A. No, sir, because they would not have accepted that clause.

Q. Do I understand that they at any time prior to this contra notified you to that effect?

A. That the entire shipment would have to go on deck?

Q. Yes.

A. No, sir.

Q. Or at any time subsequent to this contract?

A. No, sir.

Mr. Rouse: That is all.

115 Cross-examination.

By Mr. Webster:

Q. Who are you with now?

A. The Masiller Co.

Q. How soon after June 1918 was it that you severed connectio with Richards?

Mr. Rouse: That is objected to as immaterial.

A. About two months; I didn't sever my connections but he we out of business.

Mr. Webster: I move that the last be stricken out as irresponsi

Q. Mr. Zeller, this contract is dated June 6, 1918?

A. Yes.

Q. When was the first time that you saw Mr. Fox in connection with this shipment?

A. It is very hard to say; might have been a day or two previous to that day or possibly on the same day.

Q. For whom were you acting at the time?

A. For the General Commercial Company.

Q. Of America; of United States?

A. U. S.

Q. Who did you deal with of that company?

A. I don't know; there have been so many changes; I think a gentleman by the name of Louis B-e-s-c-h-e-r-e-r.

Q. After your first interview with Mr. Fox, whether it was a day or two before the signing of this contract or at some other time, did you report to this Mr. Bescherer or any one else connected
116 with the General Commercial Company of the United States?

A. About what?

Q. Your interview with Mr. Fox?

A. It would not be necessary.

Q. Please answer the question.

A. I don't know what you would want me to report. They told me to book eight hundred barrels of rosin; all I had to do was to engage space for eight hundred barrels.

Q. That is the report you gave him?

A. That is not the report—just delivering up the papers to him and several other documents which I gave him on the same boat.

Q. What other documents did you give him?

A. We have some other cargo besides the rosin.

Q. Did you give him any other documents besides these freight contracts?

Mr. Rouse: That is objected to unless it is limited.

A. I presume I did, but I don't know what they are.

Q. You say that when you first saw Mr. Fox he told you that he didn't know whether or not the entire shipment could go under deck, is that correct?

A. Correct.

Q. And that was a day or two or at some other time previous to the date on which this contract was signed?

A. Naturally previous or on that day; it would not be after.

Q. Before going ahead with the consummation of this contract didn't you speak to somebody in the office of the General
117 Commercial Company of the United States about it?

A. No; what for? I told him it would go on or under deck and they were entirely satisfied. They would have been satisfied if it would all go on deck if they were notified.

Q. Did the General Commercial Company tell you that that was all right?

A. Whether it would go on deck?

Q. Whether it would go on deck?

A. Surely.

Q. And it was after they told you that that you executed the contract?
A. Yes.
Q. Of course, you would not have executed a contract for a shipment to go on deck or under deck without their permission?
A. Yes, sir.

Mr. Webster: I don't think that is a proper answer; just read the question.

Q. (Read:) "Of course, you would not have executed a contract for a shipment to go on deck or under deck without their permission?"
A. No, sir.
Q. You don't recall how long before the execution of this contract it was that they approved your executing a contract to ship on deck or under deck, do you?
A. I don't recall; probably about the time I drew up that contract.
Q. That would be earlier in the day of the 6th than the execution of the contract, or the preceding day?
A. Around that time, yes.
Q. What was your position with M. C. Richards at that time?
A. Manager.
118 Q. Manager?
A. Yes.
Q. It was you, then who received the instructions directly from the shipper as to the making of this contract?
A. Yes, sir.
Q. I presume that your original instructions were to ship under deck?

Mr. Rouse Objected to as to form.

Q. Were your original instructions from the shipper that the shipment go under deck?
A. Yes, sir.
Q. And it was for that reason that after conferring with Mr. Fox and being told that the entire shipment could not go under deck that you again consulted the shipper to find out if it would meet with his approval to have the shipment go on or under deck ship's option?

Mr. Rouse: I object; there is no statement that he was told that.

Q. Please answer the question.

Mr. Rouse: No, not in that form.

Q. And it was for that reason that after conferring with Mr. Fox and being told that he was not sure whether or not the entire shipment could go under deck, that you again consulted the shipper to find out if it would meet with his approval to have the shipment go on or under deck, ship's option; is that correct?

Mr. Rouse: Same objection.

119 A. I believe I did.

Q. Then you knew at the time of your first interview with Mr. Fox——

A. (Interrupting.) Pardon me. You are referring to Mr. Fox; I don't know whether I was interviewing him or not; there was another man named Mr. Woodward who also had to do with engaging freights on that boat; I don't know whether I was speaking to Mr. Fox or Mr. Woodward.

Q. Then you knew at the time of your first interview with Mr. Fox or Mr. Woodward, which ever it was that you first spoke to, that the condition of a cargo already on board the St. Johns, N. F. as doubtful, whether or not your entire shipment could go under deck?

Mr. Rouse: Objected to.

A. I don't know; I didn't know what cargo they had on deck or to be booked.

Q. You knew at that time the vessel was expected to sail between June 8th and June 10th?

A. That is the way they had it advertised; but when it was going to sail I couldn't tell.

Q. That was when they said they expected it to sail, wasn't it?

A. Yes.

Q. That would lead you to believe that the vessel would be pretty well filled up by that time?

A. No, sir. Lots of vessels are advertised to sail on a certain date and don't get out until two weeks after; as I remember, that boat stayed around for some time before they could get away.

120 Q. You know as a freight broker that if a vessel was expected to sail between the 8th and the 10th of June that vessel would be pretty well filled by the 6th of June?

A. That would be so with a reliable concern.

Mr. Rouse: That is objected to as to form; also as not proper cross-examination.

Q. Weren't they reliable?

Mr. Rouse: Same objection.

A. That was the first boat they ever handled with full cargo.

Q. How long have you been in the freight brokerage business?

A. Thirteen years.

Q. Mr. Zeller, how were you paid for your work in this transaction?

Mr. Rouse: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

Mr. Webster: I insist upon an answer.

A. I cannot answer because I was not paid at all.

Q. What arrangements had you made with the shipper as to the payment of your services in this transaction? Were you to be paid?

Mr. Rouse: Objected to.

121 A. What arrangements did I make with the shipper?
Q. Yes.
A. No arrangements whatsoever.
Q. What arrangements had M. C. Richards made, if you know?
A. I don't know; I can't answer that.
Q. You don't know whether or not M. C. Richards was to be paid a commission or not?

Mr. Rouse: Objected to; the witness has testified that he has no personal knowledge.

A. To my personal knowledge I think M. C. Richards has been paid by Job,—or had been paid by Job, it should be.
Q. Mr. Zeller, didn't you say that you were employed by the General Commercial Company of the United States?
A. No, sir, never employed by them; never testified to it either.
Q. Mr. Zeller, you were anxious to have this cargo go forward at about this time?

Mr. Rouse: Objected to as immaterial.

A. Was I anxious to have this cargo go forward at about this time on that boat?
Q. Yes.
A. Well, we were anxious to get rid of the shipment.
Q. Mr. Zeller, didn't you prepare this freight contract that Mr. Rouse has questioned you about (handing a paper to the witness)?

122 Mr. Rouse: Referring to Schedule A at page 11.

A. Yes, sir.
Q. It was you who typed in or had typed in "on or under deck, ship's option," was it not?
A. Yes.
Q. That freight contract was prepared, as I understand it, after your first interview with Mr. Fox on the preceding day or at some other time prior to the 6th?
A. Yes.
Q. Do you recall that at the time you presented this contract to Mr. Fox that he called your attention to the clause "on or under deck, ship's option" and that he then told you that there was no question but that the shipment would go on deck?
A. No, I don't recall any such statement.
Q. You don't recall having told Mr. Fox that it was customary to put such a clause on a freight contract even though there were no likelihood of the shipment going under deck?
A. If I thought the shipment was not going under deck it would have read "on deck."
Q. Won't you please answer the question?
A. I answered the question.

Mr. Webster: Please read the question to him again.

Q. (Read.) "You don't recall having told Mr. Fox that it was customary to put such a clause on a freight contract even though there were no likelihood of the shipment going under deck?"

123 A. No, I wouldn't put a clause like that on a contract if I thought it was not going under deck.

Q. Then you don't recall it?

A. No.

Q. How clearly do you recollect these various conversations with Mr. Fox?

A. Or Woodward? To the best of my memory.

Q. And isn't it a fact, Mr. Zeller, that you told Mr. Fox that the presence of these words "on or under deck, ship's option" on the contract really made no difference; that it was understood that the shipment was to go on deck and that the clause did not in any way change the tenor of the original agreement?

A. No, sir.

Q. You would swear that you didn't tell him that?

A. I would swear that I didn't tell him.

Q. You would swear that you didn't tell him it was customary to put such a clause on such a contract?

A. No, sir, if he was a business man he would not have ever accepted that contract after my telling him.

Q. Then you really blame Mr. Fox for accepting the contract in that condition?

A. I don't blame him whatsoever.

Q. Mr. Fox has already testified along the lines indicated by my question. Would you say that Mr. Fox was mistaken in the testimony that he gave?

A. I would say that he is.

Q. You are quite sure that you are not mistaken?

A. I have got proofs to back it up.

Q. Please answer the question.

Mr. Rouse: He has answered it.

124 Q. Answer it Yes or No, can't you?

A. I am quite sure I am not mistaken, yes, sir.

Mr. Rouse: Will you read the question?

Q. (Read.) "You are quite sure that you are not mistaken?"

A. Yes, sir.

Q. Mr. Zeller, did you yourself obtain the bills of lading covering this shipment?

A. No, sir.

Q. Did you take care of the covering of the insurance on it?

A. No, sir.

Q. Your entire activities were confined then to the making of this contract of affreightment?

A. Engaging freight space.

Q. Then as this freight contract was made on June 6th you had nothing further to do with the transaction after that date?

A. No, sir.

Q. Mr. Zeller, you have testified that you have been in this business for about thirteen years?

A. Yes, sir.

Q. And had made a great many freight contracts prior to this one?

A. Yes, sir.

Q. And a great many subsequently?

A. Yes, sir.

Q. And yet you don't think you could be mistaken in regard to what was said between you and Mr. Fox?

A. That I made a mistake?

Q. That you made a mistake?

A. No, sir, I am not in this case.

Q. How are you sure about it in this case?

A. Because the way the shipment was handled and went forward.

125 Q. Aren't a great many shipments handled in this way?

A. No, sir, this is the first I heard of.

Q. Didn't you go to the agent and inquire for space and get space?

A. Yes, sir.

Q. Make the freight contract?

A. Yes.

Q. Close the deal?

A. Yes.

Q. And drop it from your mind?

A. I don't say drop it all the time; there are cases where we have to follow up the shipment, but in this particular case I don't think it was necessary.

Q. Why was this shipment different from any other?

A. Because everything seemed to be clear.

Q. Everything seemed to be what?

A. Everything semed to be clear; it would go off all right.

Q. Most transactions don't go off quite as nice as this?

A. In some you have trouble and in some you don't.

Q. This was an exceptionally clean deal?

A. That is what I thought when I made the freight engagement.

Q. And that is why you remember it so distinctly?

A. Yes, sir.

Q. What was your first connection with this case following the closing of the freight contract?

A. My first connection was to go up to secure space for these eight hundred barrels of rosin, besides other cargo which they had.

Mr. Webster: Please repeat the question.

126 Q. (Read.) "What was your first connection with this case following the closing of the freight contract?"

A. I had nothing to do.

Q. With the case? I am talking about the law suit.

Mr. Rouse: That is objected to as incompetent, irrelevant and immaterial.

A. When was I first called into the case?
Q. Yes.
A. About June or something of this year, wasn't it, Mr. Rouse?

Mr. Rouse: I don't recall. Put it down as about the time of the trial of the action.

Q. At that time what happened?

Mr. Rouse: That is objected to as incompetent, irrelevant and immaterial, and improper. Don't answer.
Mr. Webster: Read the question, please.

Q. (Read.) "At that time what happened?"

Mr. Rouse: That is objected to unless its materiality is stated for the purpose of the question.
Q. Were you asked to act as a witness for the shipper or for the libelant?

Mr. Rouse: Objected to as immaterial.

127 A. I was never asked as a witness; I was called upon to verify that contract.
Q. What was your next connection with the case?

Mr. Rouse: Objected to.
Mr. Webster: Read the question.

Q. (Read.) "What was your next connection with the case?"

Mr. Rouse: Objected to, and I instruct the witness not to answer.

A. The present time.
Q. Mr. Zeller, why was it that you put on the original contact "on or under deck, ship's option"?
A. I have already discussed that case.
Q. Please answer.
A. Why was it I put it on there?
Q. Yes.
A. That is the only way we could reserve space.
Q. In other words, you couldn't have gotten a straight contract for an under-deck shipment on this vessel, is that right?
A. No, sir.
Q. Do you know that the rates for on or under deck shipments differ; don't you?

Mr. Rouse: Object to that in form.

Q. You know, Mr. Zeller, don't you, that in regard to this particular shipment that the rate for an on-deck contract would be different from an under-deck contract, don't you?

128 Mr. Rouse: Objected to as to form.

A. That was not up to me; that is up to the steamship company.
Q. You were concerned with the rates, weren't you, Mr. Zeller?
A. To a certain extent, yes, sir.
Q. You wanted to get as cheap a rate as you could, didn't you?
A. To protect my client, yes, sir.
Q. The rate on this was $30 net per gross ton, was it not?
A. Yes, sir.
Q. You booked some other cargo under deck on this same ship, didn't you?

Mr. Rouse: That is objected to.

A. I believe I did.
Q. For the same shipper?

Mr. Rouse: Objected to.

A. I believe I did.
Q. Do you remember what the rate was on that shipment?

Mr. Rouse: Objected to.

A. No, I don't.
Q. Do you know whether or not that rate was higher than the rate on this contract?

Mr. Rouse: Objected to not only as being incompetent,
129 irrelevant and immaterial, but not proper cross-examination. If counsel wishes to make this witness his own on the question of rates, that is different.

A. I don't know.
Q. Mr. Zeller, would the examination of this document which I now show you refresh your recollection as to the rate on this other shipment that you booked on this vessel (handing paper to the witness)?

Mr. Rouse: That is objected to as immaterial even if it does.

A. I have a slight idea of some of that same stuff going forward.

Mr. Rouse: The answer is that it does not refresh his recollection.
The Witness: No, sir, it does not.

Q. Isn't that your signature on here, Mr. Zeller (handing paper to the witness)?
A. No, sir.
Q. You don't recall that you did book such a shipment at the same time?

Mr. Rouse: I ask if that is an original document that is being shown?
Mr. Webster: No.

A. No.
130 Q. Your answer is that you do not recollect——
A. (Interrupting.) My answer is that I booked other shipments at the same time, but what the commodity was I don't know.

Q. You testified that the rate on the other shipment that you booked on this vessel was not higher than the rate on this eight hundred barrels of rosin?

Mr. Rouse: That is objected to as it is not shown that it is the same commodity; also as incompetent, irrelevant and immaterial and not proper cross-examination; further that the witness has already testified that he has no recollection at this time as to the rates.

A. I don't know.

Q. How was it, Mr. Zeller that you do not recall even the rate on the other shipments and yet you recall all the circumstances regardin the shipment of this eight hundred barrels of rosin?

Mr. Rouse: Objected to as to form.

A. I seen a copy of the original contract with my signature; that is why I know that rate.

Q. Mr. Fox has testified that he told you there was no place under deck for this shipment of eight hundred barrels of rosin, the ship having been booked completely during the month of May, except for having a few small packages which were taken later in
131 order to fill in broken stores, and that you said you thought your shippers were quite willing that the shipment go on deck, provided they received a lower rate; do you recall that?

A. I do not.

Q. Would you deny that such a conversation took place between you and Mr. Fox?

A. I don't recall the conversation; I can't deny it and I can't affirm it.

Q. There may have been such a conversation?

A. There may have been.

Q. Mr. Fox testified also that it was finally agreed that the shipment would be accepted for on-deck at $30 per ton of 2,240 pounds provided the rosin was delivered promptly as the vessel was then about to complete loading and was expecting to sail between the 8th and the 10th of June; do you recall that?

A. No, sir.

Q. You wouldn't deny that such a conversation took place, would you?

A. No, sir.

Mr. Webster: That is all.

Redirect examination.

By. Mr. Rouse:

Q. Mr. Zeller, in your cross-examination you were asked about this typewritten clause "on deck or under deck," about its being customary; will you state whether in your experience it is customary to

put that clause on freight contracts unless the option has been reserved?

Mr. Webster: Objected to.

132 A. It is not customary.

Q. You have stated that one thing that made you remember this shipment was its peculiar handling; in what respect was this transaction peculiar?

Mr. Webster: I object to the assertion that the witness has testified that it was peculiarly handled. He stated that it went hrough clean.

A. I would not state that the shipment went through clean; when we engaged the freight everything was clearly understood.

Q. What was the peculiarity wou referred to?

Mr. Webster: I object to the question on the ground that he has not said there were any peculiarities.

A. From what I have seen, the majority of steamship companies put this on or under deck in, which says the shipments will go forward on deck or under deck, ship's option.

Mr. Webster: Objected to as incompetent, irrelevant and immaterial, and move to strike it out.

Q. And was there any alternative rate arranged for?

A. Not to my knowledge.

Q. Was the flat rate that appears in the contract of $30 a ton finally agreed upon between you and the ship?

A. Yes, sir.

133 Q. Was the clause that we have referred to "on deck or under deck, ship's option" finally agreed upon in this last arrangement with the ship?

A. Yes, sir.

Recross-examination.

By Mr. Webster:

Q. Mr. Zeller, don't you know that if this cargo were booked for under-deck shipment that the rate would have been higher than the rate in this case?

A. No, I don't know.

Q. As a shipping broker of thirteen years' experience don't you know that the rates for under-deck shipment are higher than on-deck shipments?

Mr. Rouse: Objected to as immaterial.

A. Not in all cases.

Q. As to the same commodity in the same vessel, isn't the rate under-deck higher than on-deck shipments?

A. Yes, usually, to offset the insurance rate.

Libelant-Appellee closes, except for the filing of the commission now outstanding.

134 *Extracts from First Commission Issued to E. E. Bechtinger.*

First Interrogatory. (*a*) State your name, age, address and occupation.

Answer: E. E. Bechtinger, 33 years.

Rua 10 de Marco, 96.

Managing Director, S. A. Companhia Geral Commercial do Rio de Janeiro, Brazil.

(*b*) How long have you geen a resident of and engaged in business in Rio de Janeiro? Were you residing and engaged in business in Rio during August, 1918?

Answer. I have been resident of Rio de Janeiro, Brazil, for eighteen years and in business during that entire time. I was residing and engaged in business in Rio de Janeiro in August, 1918.

Second Interrogatory. (*a*) Were you connected with the libelant during August 1918?

Answer. Yes.

(*b*) If so, in what capacity?

Answer. Managing Director.

(*c*) How long had you been so connected?

Answer. Connected with the company for one and one-half years.

135 Thirteenth Cross-interrogatory. (*a*) State fully the relationship between your company and the General Commercial Ltd. of United States.

Answer. They are entirely independent organizations.

(*b*) State if any of the stockholders or persons interested are the same.

Answer. Not to my knowledge.

(*c*) Does your company share or have any interest in the profits of this shipment with the General Commercial Company Ltd. of United States and does that company share or have any interest in the profits of this shipment with your Company?

Answer. The shipper is entitled to a straight commission of 2½% on f. o. b. value and nothing else.

136 *Testimony of John R. Fox, a Witness on Behalf of the Claimant-Appellant, Taken on June 13th, 1921, at New York City.*

JOHN R. FOX, being duly sworn as a witness for the claimant-appellant, testifies as follows:

Q. Mr. Fox, did you have charge of obtaining cargo for the steamer St. John's N. F. in June 1918?

A. May and June 1918, yes.

Q. What corporation had charge of the loading of the vessel, obtaining cargo for it?

A. The vessel was consigned by the St. John's N. F. Shipping Corporation and W. & S. Job & Company Inc. were acting as agents.

Q. Are you connected with the latter corporation?

A. Yes.

Q. In what capacity? Are you an official?

A. I am secretary of the company now; I don't remember whether I was secretary then or not.

Q. Was it part of your duties to make these freight contracts for the St. John's at that time?

A. On this particular ship it was, yes.

Q. Do you remember the General Commercial Company Limited of the United States engaging space on board your vessel for 800 barrels of rosin?

A. I do.

Q. Who made that contract for the General Commercial Company. Limited, of America?

Ans. A broker called Zeller, acting for M. C. Richards.

137 Q. You made it on behalf of W. S. Job & Co., as agents for the schooner?

A. Yes.

Q. Is this the freight contract made—the original freight contract (handing witness paper)?

A. Yes, sir.

The contract is offered in evidence and is the same as Schedule A annexed to the amended answer and is found at page 11 of the printed record.

Mr. Rouse: Objected to as incompetent, irrelevant and immaterial and not binding on appellee within the issues of this case.

Mr. Hewitt: There is no objection to the copy in the record being put in in place of the original?

Mr. Rouse: But not for what it purports to be.

It is marked for identification as being the original of Schedule A.

Q. When did you first see Mr. Zeller about the making of the freight contract?

Mr. Rouse: All testimony in relation to the dealings with Mr. Zeller prior to the making of this contract are objected to by the appellee.

Q. When did you see him first in regard to that?

A. On June 5th, or the first business day proceding June 6th; it might have been on Saturday; I don't know.

138 Q. And what was said about the place of the stowage of the rosin, if anything?

Mr. Rouse: It will be understood that my objection, without repeating it, will be carried as to all of this testimony.

Mr. Hewitt: Yes.

A. I told Mr. Zeller that we had no place under deck, the ship having been booked completely during the month of May, except for

a few small packages which were taken later in order to fill in as broken stowage. He said he thought his principals were quite willing to ship on deck, providing they received a lower rate. It was finally arranged, finally agreed that we would accept the cargo for on deck shipment at $30 net per ton of 2,240 lbs., providing the rosin was delivered promptly, as the vessel was then about completing loading and we were expecting her to sail between the 8th and 10th of June.

Q. When was the written freight contract made out?

A. Presumably on June 6th.

Q. Who prepared the contract?

A. Mr. Zeller.

Q. Did you have any conference with him regarding what was the form of the contract?

A. I called his attention to the clause in the contract "on or under deck, ship's option" when he was present, telling him that there was no question about it being on deck for shipment, and he advised that this was put on as was customary, and that it
139 really made no difference, as it was understood that the shipment was to go on deck, and that the clause did not in any way change the tenor of the original agreement.

Q. Did you have anything further to do with the shipment after that time?

A. Yes; the freight contract was passed over to my assistant, Mr. Woodward, who issued a permit, dock permit, and later when the dock receipts were returned to him, he prepared bills of lading which were passed on to me for signature along with many other copies covering shipments on this vessel.

Q. You signed the bills of lading?

A. I signed the bills of lading.

Q. Was there any difference in regard to freight rates at that time between shipments under and on deck?

A. The original rate charged on this vessel was $30 or $35 per ton weight or measure, ship's option, plus 40%, but early in June the Shipping Board fixed the rate at $30 per ton of 2,240 lbs. or 40 cubic feet, ship's option, plus 5%. The under deck rate on rosin was $30 per 40 cubic feet, not $30 per ton of 2,240 lbs., and other cargo taken for the same shippers was booked on this basis.

Cross-examination.

By Mr. Rouse:

Mr. Rouse: Without waiving my objections, I will proceed with the cross-examination.

Q. Did you say that there was other cargo of this shipper on that boat?

A. There was.

140 Q. What was it?

A. I cannot state positively, not having the records before me, but I do remember some sulphur in bags, I believe.

Q. For this shipper? You are testifying that this same shipper

had a similar shipment at the same rate—I believe you testified—of $30 per ton, or 40 cubic feet; wasn't that your testimony on direct examination?

A. I presume it was, yes, you can refer to the record.

Mr. Rouse: Will you please read the last question and answer on direct examination?

Q. (repeated). Was there any difference in regard to freight rates at that time between shipments under and on deck?

A. (repeated). The original rate charged on this vessel was $30 or $35 per ton, weight or measure, ship's option, plus 40%, but early in June the Shipping Board fixed the rate of $30 per ton of 2,240 lbs., or 40 cubic feet, ship's option, plus 5%. The under deck rate on rosin was $30 per 40 cubic feet, not $30 per ton of 2,240 lbs., and other cargo taken for the same shippers was booked on this basis.

Q. According to that answer that has just been read to you, there was other rosin shipped by this shipper, is that correct?

A. I did not say other rosin, other cargo.

Q. Other cargo carried at the same rate as rosin?

A. Yes, sir.

141 Q. What do you mean by other cargo shipped at this rate of $30 per 40 cubic feet?

A. Freight rate of $30 per ton of 2,240 lbs. or 40 cubic feet, ship's option, plus 5%.

Q. Plus 5%; are you sure of that?

A. I cannot be positive without looking at the record, but I do know——

Q. Have you the records?

A. No, I have not.

Q. Where are the records?

A. They are in our files.

Q. Will you produce them?

A. If it is material, I presume I can.

Mr. Rouse: I call for the production of the records showing charges made on this vessel and rates charged for shipments booked on or after June 6th.

Q. When did your rate change?

A. Some time around the first of June.

Q. Your records show the commodities shipped and the rates charged, do they not?

A. They do, yes.

Q. Where a higher rate was charged the overcharge was refunded to meet the Shipping Board rate, is that not true?

A. No, it was not; the Shipping Board rate was not retroactive. All shipments from the time the Shipping Board fixed the rate were booked at the Shipping Board's rate, except where we made special rates as in this case, for on deck shipments or loose stowage.

142 Q. Did you have power to make rates different from Shipping Board rates?

A. I did, under Shipping Board rates but not over.

Q. Where did you get that power?
A. Well, the Shipping Board's order was fixing a maximum rate, not a minimum.
Q. What was the maximum rate allowed by the Shipping Board for on deck stowage?
A. I don't think there was any difference between the rates.
Q. Do you know?
A. I do not.
Q. The Shipping Board announced these rates by circular, did they not?
A. I don't remember that.
Q. How was the communication to you?
A. I don't remember how they were announced.
Q. How do you recall at this time that the Shipping Board rate carried the 5%?
A. Well, that is my recollection of it; I don't know how I remember it.
Q. Are you sure that the Shipping Board rate at this time, on an outside shipment, carried the 5% surcharge?
A. I am not positive, not without referring to the records.
Q. Have you records which will show that?
A. I believe we have, yes.
Q. Well, have you examined your records to refresh your recollection for this examination?
A. I have not.
Q. You are testifying now on your recollection of this thing in 1918 without investigating?
143 A. I have examined the records so far as this particular shipment was concerned, but I have not gone over the general records.
Q. What records have you got on this particular shipment which you have examined, can you state?
A. The freight contract.
Q. Which you have produced here?
A. Which I have produced, and the bills of lading.
Q. And the bills of lading?
A. Copy of the bills of lading.
Q. What else?
A. And the letter which I wrote to Mr. Hewitt shortly after the question of loss of deck cargo came up.
Q. Does that letter discuss the rates?
A. Yes.
Q. That is all the record you have?
A. Well, yes, I don't know what we might have if I looked it up.
Q. I am asking what records you examined in respect to this shipment as you have said in order to prepare for this examination; those are the only things?
A. Yes.
Q. What record have you got which shows the prevailing rate for on deck cargo on the St. John's N. F. at that time, and how it was fixed?

A. I have no records showing what the on deck rate was on this vessel.

Q. Have you examined any records to see what the under deck rate was?

A. No, I didn't.

Q. Then your testimony here as to the shipping freight rate is purely recollection?

A. Purely recollection of the matter.

Q. Isn't it in fact unusual that the Shipping Board should
144 prescribe a rate in a sum certain plus surcharge of 5%?

A. I don't think it is no, because 5% primage is, I believe, something that has been in existence a long time, of long standing.

Q. When the Shipping Board fixed a rate, didn't they fix a flat rate?

A. I don't know.

Q. They departed from their general principle in so far as the St. John's N. F. was concerned, they departed from their usual course and made special rates?

A. No, they did not; it was a general rate that was issued, covered all ships and didn't apply particularly to the St. John's N. F.

Q. You mean that rate covered shipping from New York in every vessel; it was required on every sailing vessel?

A. I don't know that they specified 5%, but I do know that they charged it.

Q. You don't say now that the Shipping Board prescribed that 5%?

A. No, I don't know; I couldn't say without looking up the records.

Q. Did you have any other deck cargo on this boat?

A. We did, yes.

Q. And what was it you charged for that deck cargo?

A. We had a shipment of steel on deck, structural steel. I think the rate was somewhere around $45 because it was booked early in May before the rate was changed, and it was partly on deck and partly under deck.

Q. You charged them the same rate on deck and under deck?

A. Yes, in that particular instance we did.

145 Q. Is that all you had on deck on this vessel besides this shipment?

A. I think there was other deck cargo of rosin.

Q. Other deck cargo of rosin than these 800 barrels?

A. Yes.

Q. And at what rate did you charge that?

A. I don't remember without looking it up but I believe the charge was $30 net.

Q. In that case you didn't have the option of on deck, did you?

A. I am quite sure that we had the option of putting it on deck if we wanted to.

Q. I mean in your freight contract?

A. I would not be positive without looking up the freight contract.

Q. Who was the shipper of that?
A. I do not recollect; if it is material I can produce the manifest providing it has not been lost and I don't think it has.
Q. Do you think you have lost your records on that ship?
A. No, our records for 1918 are put in boxes and sent to storage to get them out of the office.
Q. You knew that this case was in litigation?
A. I did.
Q. You say that you had other shipments for this shipper; are you sure about that?
A. My recollection is very clear that there were other shipments for this shipper.
Q. How were they booked?
A. I don't recall that without referring to the records, how they were booked, but I believe it was sulphur which is booked for
146 under deck because it would not be shipped on deck in bags, at least it would not be practical, and as I recollect, we took the sulphur to fill in small places under deck to make stowage.
Q. How much sulphur was there?
A. Quite a lot, I would not know exactly.
Q. When was that booked?
A. About the same time, possibly a day or two sooner.
Q. What rate did you charge on that?
A. I don't recall without referring to the records but I know it was in excess of $30 net per ton.
Q. You do know that?
A. Yes.
Q. How do you recall that shipment for this particular shipper; was it booked by Mr. Zeller?
A. It was. I recollect the sulphur because there was a question about weight or measure and there was some controversy about it; that is one reason I remember the sulphur was shipped.
Q. And that was shipped on the 40 cubic feet rate, is that right?
A. No, I would not say that it was; I am not sure which rate it was but I know we got more than we did for the other.
Q. More than on deck?
A. More than $30 net ton.
Q. How much more?
A. I don't recall.
Q. More than 5% more?
A. I couldn't say without looking at the records.
Q. Do you think you did?
A. I am very sure of that.
Q. So that you were violating the Shipping Board's orders in that shipment, is that right?
147 A. No, I think the charge of $30 for 40 cubic feet or 2,240 lbs. whichever made the most freight; in the case of the rosin had space of 60 feet and that would be valued at about $45 a ton, and we charged on the measure basis.
Q. So that when you said that this other deck cargo on this boat that paid $45 a ton, they really are paying the same $30 for 40 cubic feet, aren't they?

A. No, you have me wrong on that; I said the other cargo of steel that was booked in May had a rate of about $45 a ton.

Q. For 2,240 lbs. or 40 cubic feet?

A. Steel is always by 2,240 lbs.

Q. By the ton?

A. Yes, not feet.

Q. Well, paying that rate is really paying the same as $30 for 40 cubic feet, isn't it?

A. Well, steel only stows in 18 or 20 feet, something like that, I wouldn't say exactly.

Q. The rosin was $30 per 40 cubic feet; there is no doubt about that?

A. My recollection is quite clear that the rate was $30 for 40 cubic feet or 2,240 lbs. on any cargo, ship's option.

Q. You have just testified, I thought, in the last answer on direct examination that the rosin was $30 per 40 cubic feet and not 2,240 lbs.; I think you emphasized that point, didn't you?

—. Ship's option always, and we always took 40 cubic feet because it gives us $45 a ton net instead of $30.

Q. You didn't in this case, did you?

A. No, because it was an on deck shipment and we made a flat rate of $30 per ton of 2,240 lbs.

Q. You are sure about that?

A. I am positive.

148 Q. On the other shipments for this same shipper I think you said in your direct examination the rate was the same—$30 for 40 cubic feet?

A. No, I didn't state any specific rate; I said it was more than that. I didn't say how much more because I would have to look it up.

Q. Are you clear that rosin runs—?

A. 60 cubic feet.

Q. 60 cubic feet to a ton?

A. I am quite sure that it does—very close to 60 cubic feet.

Q. 2,240 lbs. is a ton?

A. Yes. When the cargo is offered, it is the actual measurement of the barrel that is taken, not necesarily the commodity, because it may be packed different; it may be in straight barrels or in convex barrels and we always take the deck measurement of it.

Q. You acepted this freight contract with the "on or under deck ship's option" clause?

A. I did.

Q. And you then caused permits to be issued?

A. I did.

Q. And they carried that clause?

A. The contract was handed to the clerk and he simply copied the contract.

Q. You saw them?

A. I did not.

Q. And you did not tell this clerk anything about this clause of the freight contract being of no value, to be ignored?

A. I don't recall exactly what I told him as to that but I am quite sure he knew it was to be on deck.

Q. How would he know it?

A. In a general way; he was keeping the records.

149 Q. Was he present when you made this contract?

A. I am not positive whether he was or not; his desk was next to mine and the chances are he was.

Q. So that with that knowledge he issued a permit which said "on deck or under deck at ship's option"; do you think that is the same thing as providing for an on deck shipment?

Mr. Hewitt: Objected to. The document speaks for itself.

A. I don't think it is material because if it is an on deck shipment—it went over there at the last moment.

Q. What is there on this paper that says it is an on deck shipment absolutely and that there is no possibility of its going under deck?

A. The paper speaks for itself.

Q. Can you point to what there is on the paper that speaks that way?

A. No, it simply says "on or under deck ship's option."

Q. Is there anything on this contract which says that it is an on deck shipment absolutely?

A. There is nothing on it that I know of except the clause I just read.

Q. Now these dock receipts—did you call them permits—are made out in your office by the clerk, as you have described, aren't they?

A. Yes.

Q. On a printed form?

A. Yes.

Q. And they are given to the shipper, or to whom?

A. They are usually given to the broker who makes the bookings.

150 Q. How soon after the contract is made?

A. They are usually given to him at the same time as the contract is made, telling him when to present his goods.

Q. For the broker to give to his customer, or whoever is going to ship under that contract? Anybody can ship under it?

A. Not necessarily, no, only the people who actually booked the space.

Q. I show you these two papers marked Appellant's Exhibit- 2*a* and 2*b*, and ask of those are the permits covering the shipments in this case, copies of them?

A. They appear to be; I would not identify them positively.

Mr. Hewitt: They were sent from your office; you gave them to me.

A. (Continued). There is no doubt but what they are.

Q. Have you got the originals?

A. I don't think we have, no.

Q. Where are they?

A. I believe that the custom was that the original was sent to th dock and the clerk kept it on the dock and issued the dock receip to the shipper.

Q. Do those purport to be, then, carbon copies?

A. This appears to be a carbon copy of the original.

Q. This is the carbon copy that is given to the shipper?

A. No, the original I believe is given to the shipper.

151 Q. The carbon copy retained by you?

A. The carbon copy is retained in the office, and this (re ferring to paper) appears to be our office copy. Here is the pro ceeding: The broker comes in with his freight contract and if hi declaration is in order, we give him a dock permit, which he send with his goods to the dock, the original; the duplicate is sent by u direct to the receiving clerk so that he will know what is coming i advance; the triplicate is kept in our office.

Q. They are all alike?

A. They are all alike.

Q. All made at the same time?

A. All made by carbon—except they are marked "Original, "Duplicate," "Triplicate."

Q. Are these copies marked what they are?

A. These are the triplicate copies.

Q. Is there any doubt in your mind that these are the actu original triplicates?

A. No, no doubt whatever.

Q. You will notice that these bear in handwriting, inserted i blanks, "on or under deck, ship's option," do they not?

A. Yes.

Q. When the goods are delivered, the original of this accompani the goods?

A. Supposed to accompany the goods, yes.

Q. And they are examined before the bill of lading is signe aren't they?

A. They are not.

Q. None of these sets of permits?

A. No.

Q. None of them come to you with the bill of lading when y sign it?

A. No.

Q. What comes to you when it is signed?

A. Well, this comes back—this dock permit comes back togeth with a copy of the dock receipt.

152 Q. The dock receipt is issued by your own clerk on t dock?

A. The clerk having charge of the shipment.

Q. Have you got those?

A. I have what appears to be copies; they are not signed. Y have the originals.

Q. But you just testified that a copy of the dock receipt comes back to you?
A. Back to the office.
Q. Where does the original go?
A. To the shipper.
Q. And isn't it a fact that he presents the original dock receipt to your office to get his bill of lading?
A. Very seldom.
Q. Isn't that what was done in this case?
A. I don't recall that the original was ever presented because it is not in our files.
Q. What evidence have you that the merchandise for which you are requested to issue a bill of lading is on your dock or on your ship?
A. Well, we have received a copy of the dock receipts issued by the clerk at the dock, from which bills of lading are prepared and as they are not transferable, or not negotiable, there is no reason why we should not deliver the bill of lading to the shipper who booked the cargo, providing we know him, and we do not always require the original dock receipt, although it is customary in some lines.
Q. You don't recall now whether your office took up the dock receipts in this case or not?
A. No, I don't recall now.
153 Q. The original of those dock receipts would be signed by the——?
A. Receiving clerk.
Q. And these show the dates on which the merchandise was delivered, don't they?
A. They don't appear to have any date except on the reverse side showing June 11, 1918.
Q. That shows the checking date, doesn't it, the tallying, I mean?
A. Shows the tallying, but that could have been tallied at any time.
Q. It is in the same handwriting there, isn't it, the date of the tally?

Mr. Hewitt: The document shows for itself; I object to the witness being asked to guess what is on the document.

Q. You cannot read what it——
A. The lighter is usually delivered alongside the ship; it may be loaded that day and it may be loaded three or four days later and it is not the custom to tally until it is loaded.
Q. Do you issue a bill of lading before they are put on board?
A. Sometimes we do, yes.
Q. Did you in this case?
A. I wouldn't be positive whether we did or not.
Q. Would you say that you did or that you did not?
A. I would not say either that we did or did not.
Q. Do you know?

A. I do not, no.
Q. You didn't know where this shipment was when you issued the bill of lading, did you?
A. I knew that it was going on deck; I knew that it was an on deck——

154 Mr. Rouse: Strike that out as not responsive. Read the question.

Q. (Repeated.) You didn't know where this shipment was when you issued the bill of lading, did you?
A. I knew that it had been delivered alongside the ship, but whether on board or not I couldn't say.
Q. Did you have any knowledge that any of it was on board?
A. Personal knowledge, no.
Q. When did the ship get into port?
A. I don't recall the exact date.
Q. When did it begin to load?
A. I could not state that without referring to the records, but sometime around the first of June. I believe she arrived in port around the middle of May.
Q. You began to load the first of June?
A. Began to load toward the end of May.
Q. You are sure of that?
A. Yes, I am sure she began loading in May.
Q. Isn't it a fact that nothing had been loaded on board when this freight contract was signed?
A. No, it isn't a fact; when that was signed she had been loading for several days.
Q. Did you book any cargo after this freight contract was signed for anybody?
A. This was one of the last bookings that we made.
Q. But there was subsequent cargo booked?
A. I don't believe there was but I could not state positively without referring to the records.
Q. Your records would show, would they?
A. Our records would, yes.
155 Q. When did the ship sail?
A. About the 17th or 18th of June; it was delayed in port because of war restrictions at that time.
Q. You would say it was not on the 19th?
A. I would not be positive whether it was the 19th; she might have sailed on the 17th.
Q. She loaded cargo right along from the 11th to the 17th?
A. She did not.
Q. When did she stop loading cargo, do you know?
A. I cannot state the exact date.
Q. Were you down at the ship every day?
A. I was down at the ship about twice while she was loading.
Q. So that you have no personal knowledge on that?
A. No, only the reports we received from the dock.

Q. Now you have stated that Zeller was—who was Zeller—was he an employee of M. C. Richards?

A. He represented himself to be.

Q. And M. C. Richards were the brokers handling the freight on this ship?

A. They were the brokers who requested—who arranged space as evidenced by their contract.

Q. Who booked the freight—general cargo—on this boat; did M. C. Richards book the general cargo on this boat?

A. You mean all the cargo for the ship?

Q. Yes.

A. No, it was booked through possibly 25 brokers.

Q. Was M. C. Richards freight space broker for the ship?

A. Richards I don't believe booked anything except for the General Commercial Company.

156 Q. Did you sign that contract that you have in your hand?

A. I signed the original; I didn't sign this one.

Q. I thought this was the original?

A. It is made up in triplicate ; that is our office copy.

Q. Where did you sign the original of this which purports to be the name of M. C. Richards?

A. I used a rubber stamp.

Q. Above this signature?

A. I don't know, either above or below, I couldn't say, but somewhere across the face of the comtract.

Q. You paid the premium of 1¼%?

A. I did; that is the custom, yes.

Q. You did?

A. Yes; Richards was unknown to us until the time he came in to make this shipment.

Q. This was the only shipment he made on this ship?

A. No, there were other shipments for General Commercial Company, Ltd. for whom he was acting as broker.

Q. How do you know he was acting as broker?

A. Because he booked cargo.

Q. That is all you know?

A. That is all I know about him. I had never met him before and I don't think I have ever seen him since.

Mr. Rouse: I move to strike out the testimony in so far as it purports to hold Zeller as the authorized broker for the shipper as not binding on the libellant-appellee in this case.

Mr. Hewitt: Objected to, as the witness, Mr. Hansen, already called by the libellant-appellee has testified that Zeller acted

157 for Richards who was broker for the libellant-appellee.

Q. How much steel was there on deck on this trip?

A. I couldn't state positively without referring to the records, probably 50 tons.

Q. What other cargo did you say was on deck on this trip?

A. My recollection is that there was some rosin on deck.

Q. Was that—for whom?

A. I don't recall now without referring to the records.
Q. That was in addition to the present shipment?
A. That was in addition to the present shipment.
Q. And was that rosin delivered?
A. No, all deck cargo except the steel was washed overboard accord-ing to the master's protest.
Q. Was there anything else except these two shipments of rosin and the steel that you have testified to on deck?
A. I don't recall positively; I don't think there was.
Q. How high was she piled on deck, do you know?
A. Three barrels high.
Q. Steel under that?
A. The steel was loaded amidships, piled amidships and lashed to the hatches, and the rosin piled on either side.
Q. Structural steel or rails?
A. Structural steel.
Q. Did you have any other rosin on the deck?
A. Quite a lot of it.
Q. Did you have the option in respect to the other shipments you took of loading under deck or on deck?
158 A. We did not because it was booked specifically for under deck; I think one or two shipments were on deck, had the option of under deck or on deck, with a different rate for on deck.
Q. You signed the bill of lading for this shipment?
A. I did.
Q. You remember the incident?
A. I did.
Q. You signed it on the date the bill of lading appears?
A. I wouldn't say positively that was the day; I would say that it was that day or the day following.
Q. You had before you when you signed it the dock receipt and a copy of the contract?
A. I cannot state that I did, no.
Q. You may have had?
A. I may have had.
Q. As part of the file for the shipment?
A. The custom was that the clerk in the office prepared the bill of lading and presented them to me for signature, possibly two or three hundred at once and seven of each bill of lading and you wouldn't be expected to examine each one.
Q. You do not mean to say that at this particular time when you signed this there were two or three hundred other bills of lading there?
A. No, not at that particular time, but there were quite frequently
Q. You remember signing this bill of lading?
A. I don't particularly recall the specific instance when I picked up the pen and signed it but I do recall that I signed it because my signature is on it.
159 Q. Now when that bill of lading was signed, it was delivered to the shipper, or somebody representing him, I suppose on payment of freight?

A. I send them to the office; they are taken by a clerk who hands them to the cashier and I don't know what they do then.

Q. I believe that you said that this other rosin that was loaded under deck a straight—was that under a contract in the form of this one?

A. Similar contracts; that is, all brokers have a different form of contract, but it is substantially the same.

Q. Did it specify where it is to go?

A. It is customary.

Q. It says nothing or else it says "on deck," is that it?

A. Well, I don't recall the special form.

Q. Do you usually clause them particularly when you are going to put them on deck?

A. Yes, it is customary, if they are to be on deck, to say "on deck;" brokers usually put in "under or on deck, ship's option."

Q. You usually see that it is there if it is going under deck?

A. Not necessarily, no.

Q. You don't have the privilege if some mention isn't in?

A. It all depends on the kind of agreement there was when you booked the freight.

Q. You express on your contract the agreement?

A. Not always.

Q. You never put on there anything that is not in the agreement?

A. Well, sometimes there are things put on there as in this
160 case that are not in the agreement.

Q. Well, you signed it with that on?

A. Because it did not materially change the tenor of our agreement and there was no necessity for striking it out, as the broker pointed out when he presented it.

Mr. Rouse: I ask leave to suspend on this witness and call for the production of the records of all the shipments on this schooner on the trip referred to in the libel, showing the contracts, copies of the bills of lading and the freight bills of all shipments—freight contracts, freight bills and permits and copy of your manifest.

Q. Did you have a stowage plan of this boat?

A. No, we had a rough sketch probably, but I do not know that we had a regular stowage plan.

Q. Do you remember the bills of lading on your rosin shipment other than the one involved in this suit which was on deck, that was clausedd, wasn't it?

A. I don't recall whether it was or not.

Q. You have copies of it?

A. I presume we have copies, as I told you before they were sent to the files last year and the file may not be complete. We have the file somewhere because the bills of lading must have been taken out.

161 Examination of witness suspended.

Mr. Hewitt: I offer in evidence the dock receipts, copies of the receipts, which have been referred to.

Mr. Rouse: Objected to as not being originals, and not signed, the absence of the originals not being accounted for.

The papers are marked Claimant's Exhibits No. 7 and No. 8.

Redirect examination.

By Mr. Hewitt:

Q. These Exhibits 7 and 8 are the copies of the dock receipts which are sent from the dock to your office?
A. Yes.
Q. The original signed by the clerk at the time is given to the shipper or his representative?
A. Yes.

Mr. Hewitt: I call for the original dock receipts.
Mr. Rouse: In answer to that, is it not a fact that these original dock receipts are usually returned to the office of the steamship?
The Witness: In case he had returned the original he would give that to him.

By Mr. Rouse:

Q. That is the only reason you state that the original was not returned in this case?
A. Yes, because I can't recall.
162 Q. They sometimes are retained by your company?
A. Occasionally, probably 25% retained and the others not.
Q. So you cannot say that they were retained in this case?
A. No.

Mr. Rouse: Proctor for libellant-appellee in answer to the demand for the production of the original dock receipts states that he has been advised by the shipper that the original of these papers were delivered to W. S. Job & Co. in exchange for the bill of lading and freight bill at the time the freight was paid.

By Mr. Hewitt:

Q. Did you engage Zeller or Richards for this transaction?
A. We did not, no.

Mr. Rouse: I object to that and move to strike out the answer, unless the scope of the answer is limited to the present witness or his personal knowledge.
Mr. Hewitt: I want to state on the record that I am going to object to the admission of the commission offered in evidence and the testimony taken on June 1st by Mr. Bechtinger, inasmuch as it was taken on a question of damages when the case was in the hands of a commissioner. Certain interrogatories propounded to this witness under the commission were struck out by Judge Augustus
163 Hand on a hearing before him, for the reason that the commission was only on the question of damages, therefore the cross-interrogatories had no place in the commission.

JOHN R. FOX, cross-examination continued from page 30 of testimony taken June 13, 1921.

By Mr. Rouse:

Q. Mr. Fox, have you produced the papers called for at the last hearing?

A. The ship's manifest.

Q. Is that the only paper you are producing?

A. And a letter from ourselves to Messrs. Haight, Sandford & Smith dated January 7, 1919. The office copies of the bills of lading, freight contracts and dock receipts called for by you could not be located in our office, although we made diligent search.

Q. Do I understand you cannot find any copies of the bills of lading on this vessel on this trip?

A. I found a few non-negotiable unsigned carbons but not a complete set and not the regular office copy.

Q. You have reason to believe that these bills of lading are not authentic copies of original bills of lading?

A. No, they would not be accurate because any changes made in the original or any of the commercial copies would not have been made on these copies.

164 Q. Have you produced those for inspection?

A. No.

Q. Have you found any of the freight contracts on this vessel?

A. None at all excepting the contract with the General Commercial Co. which was sent to our attorneys.

Q. Those are the contracts that have been put in evidence?

A. Yes.

Q. This manifest shows all the rosin shipped on the boat?

A. It shows everything shipped on the boat including rosin.

Q. I understand other rosin than that of the libelant was shipped on deck, so far as you are informed?

A. To the best of my knowledge and belief there was other shipments on deck.

Q. I understand that you cannot tell at this time which ones or exactly how many were shipped of your own knowledge?

A. Of my own knowledge I don't know that any was shipped on deck but I do know several shipments were booked.

Q. How do you know?

A. Because I made the bookings.

Q. Then you recall the shipments that you booked?

A. I do.

Q. You haven't the records at this time?

A. I haven't a copy of the booking, but from the manifest it shows which was on deck and which under from the rate of freight shown on the manifest.

Q. That is the only way you can tell?

A. Except by recollection,—yes.

165 Q. And from recollection you can tell which were on deck and which were not?

A. I can tell which were booked for on deck and which were no booked for on deck. I know that certain rosin was shipped on deck because I saw the ship. I couldn't tell because I didn't see the marks.

Q. Are you prepared to testify that all of the rosin booked by you for shipment under deck was actually put under deck?

A. As stated before, I have no personal knowledge of exactly which rosin was put on deck and which was not.

Q. I shall repeat the question. Are you prepared to testify as to whether or not everything that was booked for under deck shipment actually went under deck?

A. No.

Q. Is it possible that any of the cargo of rosin that was booked for under deck went on deck?

A. A mistake could have been made, certainly.

Q. You booked rosin for on deck shipment also?

A. Yes, for on deck and under deck.

Q. Can you testify whether the rosin you booked for on deck was all put on deck?

A. No.

Q. Can you recall at this time exactly which of those shipments you booked for under deck shipments?

A. Yes.

Q. Do you recall that from your recollection or from your inspection of the manifest?

A. Both.

Q. Your recollection is clear on that?

A. It is as clear as it could be after three years' time.

166 Q. When was this manifest made up?

A. About June 15th, just prior to the sailing of the ship

Q. Were all the figures on that manifest put in at that time?

A. Everything except the pencil figures and probably the amount of freight.

Q. The manifest was not made up by you, I suppose?

A. It was made up under my supervision and I checked it over after the bills of lading.

Q. When did you see the pencil figures put in?

A. I saw the pencil figures in the column "conditional lighting charges" put in today.

Q. You put them in today yourself?

A. No, I had a clerk figure it out.

Q. They are not your figures?

A. No not my figures.

Q. The freights were put in, of course, at the time you check- the manifest over, weren't they?

A. You mean the total amount of freight.

Q. The total amount of freight in the last column?

A. Yes.

Q. In all cases?

A. In some cases they have been changed.

Q. I notice that the freight rate of the shipment of libelant is in pencil, while all the other freight rates are in ink?

A. Because this particular shipment was one of the last taken out.

Q. The last on the manifest?

A. No, but the last to come in and be made out.

Q. In other words, you left the freight rate blank, didn't you?

A. I made it blank when it was first made. It was the last
167 cargo loaded on board the ship and we did not get the figures to enable us to calculate the freight until a short time previous to sailing and after the manifest had been partly made out.

Q. Do you know that of your own recollection?

A. It is my recollection and it is my figures in pencil that were put in.

Q. Do you recall putting them in?

A. No, but I recognize them.

Q. Do you recall when?

A. I cannot. They were put in sometime on or about June 15, 1918.

Q. Is it not a fact, Mr. Fox, that those figures were put in the day the ship cleared?

A. I cannot state exactly the date, but it was sometime about the 15th of June.

Q. That was substantially after the shipment was loaded on board. According to your previous testimony, it was put in a few days previous to the sailing of the vessel.

A. The other rosin shipments came in to be loaded about the same time. The under deck shipments were sent over much earlier.

Q. How about the on deck shipments?

A. They were loaded about the same time yours were. My recollection is that they were loaded before I was on the deck and did not see any of the cargo loaded except once or twice.

Q. Do you remember the shipments that went on deck beside the libelant's, of rosin as to their bills of lading and contracts?

A. I do not remember the details.

168 Q. They were booked for on deck?

A. Well the rosin which I have previously stated—they were booked for on deck.

Mr. Webster:

Q. Mr. Fox, have you any reason to believe that any of the cargo that was booked for under deck went any place other than under deck?

A. I have no reason to believe that any of the cargo went in any part of the ship other than where it was booked for.

Mr. Rouse:

Q. Mr. Fox, you have other suits growing out of this trip of the St. Johns?

Mr. Webster: I object to the question as immaterial, irrelevant and incompetent.

A. Yes.

Mr. Rouse:

Q. You have other claims growing out of this?

Mr. Webster: Same objection.

A. We have had theft and pilferage claims.

Mr. Rouse:

Q. And in respect to those claims you have had to use the files, bills of lading and reports and documents at various times
169 and send them to your attorneys?

A. We have.

Q. When was the last time you saw the files in this case?

A. Probably a year ago, because I don't handle the claims personally.

Q. You have had to send the papers to Johnson & Higgins from time to time, haven't you?

A. We have sent only the particular set of documents in question, but have never sent the whole file to anyone, as far as I know.

Q. Can you tell me the date on which the Vulcan Steel Products shipment of rosin was booked?

A. It was booked on or about the 20th day of May and not later than the 31st of May.

Q. Was any of this rosin booked subsequent to June 1st, except the libelant's?

A. I don't recall positively, but I believe the shipment of Thos. Watson & Co. was booked in June.

Q. Before or after the libelant's shipment?

A. My recollection is that it was before or about the same time.

Q. Was that one of the on deck or under deck?

A. On deck.

Q. When was the G. Amasink?

A. About the same time as yours.

Q. Strong & Trowbridge—were they booked when?

A. Those were booked earlier. I should say about the 25th of May.

Q. Pierson Engineering?

A. That was also booked earlier.

Q. That was on deck?

A. Under deck.

Q. In May?

A. That is my recollection.

170 Q. None of your under deck was booked after June 1st, except the libelant's.

A. I think there was one or two small shipments—I don't recall.

Q. What records do you keep of those bookings—any ledger?

A. We keep a copy of the freight contract and the copy of the freight contract, dock receipt and the office copy of the bill of lading all in a clip.

Q. And they are all gone?

A. The entire file is gone.

Q. This item of Vulcan Steel Products Co.?

A. That is the shipment I saw that was on deck.

Q. That shows the total was 111,460 lbs.

A. I am not sure whether all or part was on deck. The captain advised that part of the steel was on deck. Whether part or all I don't recall.

Q. That shows in the margin $1,991.04 as being the freight?

A. Yes.

Q. How about the steel sheets—do they carry the same rate as O. H. beams?

A. Same rate. The whole shipment under and on deck booked at the same rate. It was booked originally to be under deck. I don't recall whether there was any difference. They did apply for a refund.

Q. They did not get it?

A. I don't recall whether they got it.

Q. If you turn up these contracts, I suppose you will let us see them?

A. I shall be very glad since we want them ourselves to keep our files complete.

171 Mr. Webster:

Q. Mr. Fox, you have testified on cross-examination that diligent search was made to locate the various documents that Mr. Rouse has asked for. Will you tell us whether or not you personally searched for those records and if so, how much searching you did?

A. I had a filing clerk go through all the records in the warehouse, as our files for that year had been sent to the warehouse and had him go through the office files. I personally went to the warehouse, looked through all the boxes there and I also looked through all the files in the office personally and I spent the greater part of the day doing it.

Q. How much time did the filing clerk to which you refer spend looking for these files?

A. I think he was engaged about 2 days and I also had Mr. Hanson, who was formerly my assistant look for them.

Q. How long did Mr. Hanson look?

A. About 2 hours.

Q. Altogether there were more than 3 days?

A. Yes.

172 *Testimony of John R. Fox, a Witness on Behalf of the Claimant-Appellant, Recalled on November 3rd, 1921.*

JOHN R. FOX recalled:

Direct examination.

By Mr. Hewitt:

Q. Mr. Fox, since the last time you were examined, have you discovered any additional papers in connection with the St. Johns' N. F. trip?

A. No, at your suggestion I asked Johnson & Higgins if they had any copies of bills of lading in connection with the various claims handled by them for the Billbrough Club and they advised that the only copies of bills of lading in their possession were two or three claims where there was a shortage of automobile parts, etc., none of which pertained to shipments made by the General Commercial Company, Ltd.

Mr. Hewitt: I offer to get those for you if you need them or you can examine them at your convenience.

Mr. Rouse: I do not call for their production.

Q. The only papers you have in connection with the St. Johns' shipment are the manifests which you have here today?

A. Yes.

Q. They consist of 20 pages?

A. Yes.

173 Q. And this shows all the cargo shipments?

A. Complete shipments.

Q. Does that show any other shipments by the General Commercial Company of the United States?

A. It does, yes.

Q. What other shipments were there?

Mr. Rouse: Testimony as to other shipments by the St. Johns is objected to as immaterial, incompetent and irrelevant to the issues, particularly as it is admitted that there were other shipments of this particular ship on board.

A. Bill of lading No. 48, 50 barrels of zinc white.

Q. What was the rate on that?

Mr. Rouse: Let me ask if the rate appears in the rate column on these manifests.

A. No, the rate doesn't, the weight, cubic feet and total amount of freight including $1.38 on each bill of lading, consular charge appears.

By Mr. Rouse:

Q. In answer then to Mr. Hewitt's question as to the rate, how are you going to calculate that or is it your expectation to give only the freight rate?

174 A. I can arrive at the rate of freight by the nature of the cargo, whether it was weight or measure.

Q. You cannot therefore testify whether your calculation now will be what appears in the bill of lading and the freight bill rendered is that correct?

A. That is correct.

By Mr. Hewitt:

Q. Will you please tell us what figures are given there?

Mr. Rouse: Objected to as immaterial, irrelevant and incompetent.

A. 16,250 pounds measuring 446 cubic feet, total freight $229.89.

Q. Can you figure out the rate of the freight?

A. The freight was charged at $30 for 2,240 pounds.

Q. Were there any other shipments by the Commercial of the United States?

A. 335 bags of crude brimstone, weight 68,340 pounds, measurement 1,424 cubic feet, freight $1,122.58.

Q. What was the rate on that?

A. It was booked at $30 per 2,240 pounds or 40 cubic feet ship's option, but there was a dispute between the shipper and ourselves about the amount of freight as they contended it was weight cargo instead of measurement cargo and there was some compromise made at final settlement, I don't recall the exact basis.

175 Q. Is there any other shipment?

A. Yes, bill of lading 223, 100 barrels of soda ash, weight of cargo 30,000 pounds, measurement of cargo 1,000 cubic feet, total freight collected $751.38, this was booked at the rate of $30 per 2,240 pounds or 40 cubic feet ship's option and freight was collected at the rate of $30 for 40 cubic feet, this being measurement cargo instead of weight.

Q. Were there any other shipments?

A. The on deck shipments previously referred to, 800 barrels of rosin, as far as I recall those were the only shipments.

Recross-examination.

By Mr. Rouse:

Q. This 800 barrels of rosin that you refer to is what appears on this manifest as item 246?

A. That is right.

Q. I notice that the extension of freight here is in pencil, is that correct?

A. It is, yes.

Q. I notice also a penciled notation of $6.65 under additional landing charge, what is that?

A. That is a memo. made by someone recently in figuring the rates charged on the various rosin shipments, I believe the last time we took testimony.

Q. The last time we were taking testimony—I notice that in the same column of additional landing charges opposite other rosin items there are some figures?

A. Those figures were also to show the rates—they were not put on at the time the manifest was originally made.

176 Q. You didn't personally make them?

A. No.

Q. You know nothing about them of your personal knowledge?

A. No.

Q. I notice that this figure of the total freight in pencil for the General Commercial Company is the only total freight item on that page in pencil except three that have been corrected and changed from the ink totals originally put down, am I correct in that observation?

A. You are, the reason is——

Q. Never mind, I don't want your reasons——

Mr. Hewitt: I object to that, let the witness be allowed to answer the question fully.

Q. Was there any other deck cargo of any shipper on this ship?

A. There was, yes.

Q. Please tell us which of the items on this manifest were deck cargo?

A. It is impossible for me to testify which is deck cargo from this manifest because I did not see any of the cargo loaded.

Q. You know that there was other deck cargo?

A. I know that there was other deck cargo of rosin and also a shipment of steel for the Vulcan Iron Works.

Q. Who was the shipper of the other deck load of rosin?

A. Thomas Norton & Company were the shippers of some of it.

Q. How much did they ship on deck?

A. I am unable to state as they had several shipments, a few under deck but most on deck.

177 Q. On Item No. 223 which I believe is the soda ash item, you testified that was $30 per long ton?

A. Or 40 cubic feet.

Q. Now does the second column on this manifest marked "Measure of cargo" show the number of cubic feet?

A. Shows the number of cubic feet reported to the office from the dock.

Q. That is what you calculated your freight on?

A. Yes.

Q. The total freight $751.38, will you figure out on this page whether that is 40 cubic feet or not?

A. You want me to figure it out?

Q. At the rate of 40 cubic feet per 1000 foot shipment, what rate this freight is at $751.38 as appears on the manifest—what rate of freight that is per 40 cubic feet?

Witness does as requested.

Q. And that went under deck?
A. That went under deck.
Q. Is the same calculation true of No. 212, which I believe you said was the brimstone shipment of this shipper?
A. Yes, as I stated originally there was some question about this particular shipment and some concession made.
Q. Is that concession noted on this manifest?
A. I am unable to state, I don't believe it is.
Q. What is this penciled notation in the last column "Not paid," what does that signify?
A. When we were checking off the manifest after the ship sailed to ascertain which shipper had paid and which had not, that
178 notation was put on there then—this freight was figured on a cubic basis plus 5% and that is how they arrived at it I imagine.
Q. As a matter of fact you didn't do this figuring?
A. No, but I know there was a dispute and an allowance made but this figure was not collected.
Q. It was afterwards adjusted at a different figure?
A. Yes.
Q. Which was less as you recall it than stated in this manifest?
A. Yes, less.

Re-redirect examination.

By Mr. Hewitt:

Q. You were giving some explanation in regard to the penciled memorandums when you were stopped by opposing counsel, will you please tell what they were in regard to the entries being in pencil?
A. Referring to this rosin shipment?
Q. Yes.
Mr. Rouse: Of your own knowledge.
A. This particular shipment was one of the last put aboard and was only about the time the ship was ready to sail that we had the exact number of barrels aboard, therefore the freight on this item was not calculated until after the manifest had been practically completed, the penciled figures appearing on the manifest in the amount of $5,319.95 are in my handwriting.

179 Re-recross-examination.

By Mr. Rouse:

Q. Can you tell when you placed those there, as to the date?
A. My recollection is that it was on or about—shortly after the vessel sailed, say within 10 days, but I can't postively.

Q. What was the total tonnage of the boat, the cargo tonnage?
A. Do you mean capacity?
Q. Yes, the under deck total?
A. I don't recall the vessel's registered tonnage but she was supposed to carry under deck about 3,000 tons of weight cargo—under and on deck 3,000 tons of weight cargo.
Q. What is the cubic?
A. My recollection is that her cubic was 156,000 feet under deck.
Q. How many tons would that be, do you figure that at 40 cubic feet per ton?
A. Yes.
Q. That would be how much?
A. About 3,900 tons, this however, is grain cubic and not bale cubic—15% less—bale would be approximately 20% less because of broken stowage.
Q. That would make her about 3,720?
A. No, 3,120 under deck.
Q. I don't suppose she has any registered capacity for on deck?
A. No, her on deck capacity is regulated by what she has under deck.
Q. Have you anywhere the figures to show what this ship carried on this trip?
A. The manifest indicates that she carried 3,796.
180 Q. What?
A. Measurement or cubic ton or 2,795 long tons.
Q. By weight?
A. By weight, under and on deck, these figures are very nearly correct because they were checked back under my supervision.

It is stipulated that the manifest be impounded and produced before the court if desired by the court.
The claimant rests subject to return of commission from Rio.

181 *Testimony of E. E. Bechtinger, a Witness on Behalf of the Claimant-Appellant, Taken by Commission on November 22, 1921, at Rio de Janeiro, Brazil.*

First Interrogatory. Are you the same E. E. Bechtinger who previously testified on behalf of the libelant-appellee in this case that in August, 1918, you were the Managing Director of the libelant-appellee, S. A. Companhia Geral Commercial do Rio de Janeiro?
Answer. Yes to both questions.
Second Interrogatory. Do you know what was the relationship between The General Commercial Company, Ltd., of the United States, shipper of the 800 barrels of rosin that are the subject of this action, and S. A. Companhia Geral Commercial do Rio de Janeiro, the consignee and libelant-appellee, as regards this particular shipment?
Answer. Yes.
Third Interrogatory. If you have answered the second interrogatory in the affirmative, please state fully what it was.

Answer. They are branches of the same organization.

Fourth Interrogatory. Please state whether or not S. A. Companhia Geral Commercial do Rio de Janeiro instructed or
182 requested The General Commercial Company, Ltd., of United States to purchase and ship to the libelant-appellee the 800 tons of rosin that are the subject of this action.

Answer. Yes, with the correction that they are barrels, not 800 tons.

Fifth Interrogatory. If you have answered the Fourth Interrogatory in the affirmative, please state under what conditions or by what arrangement the shipment was made as between shipper and consignee.

Answer. Purchase on the part of the consignee on C. I. F. price.

Sixth Interrogatory. If the rosin was not shipped pursuant to the libelant's request or instructions, please state under whose instructions, or at whose request it was shipped, stating fully all the circumstances.

Answer. Cancelled, in view of answer to No. Five.

Seventh Interrogatory. If there be any further facts that you can add that will tend to aid the Court in determining what was the legal status between the shipper and consignee as regards this particular shipment, please state what they are.

Answer. Nothing else to be added since I mentioned that they are branches of the same organization.

183 First Cross-interrogatory. If you answer the First Interrogatory in the affirmative, state whether, in the course of your duties during July, August and September, 1918, you had anything to do with the purchase, handling and selling of American Rosin K.

Answer. In answer to the First Interrogatory submitted in my deposition as Managing Director of the consignee, yes.

Second Cross-interrogatory. If you answer yes, state exactly what your duties were and what you did.

Answer. Answered by No. 1.

Third Cross-interrogatory. Did you or your company purchase 800 barrels of American Rosin K during June, 1918, from the General Commercial Company of U. S., Ltd., for shipment from New York on the Schooner "St. Johns, N. F."?

Answer. Yes, but at time of purchase it was not specified by what steamer or ship the shipment should be made.

Fourth Cross-interrogatory. If you state that you did, state whether you received a bill of lading, shipping documents covering shipment, and draft for the purchase price thereof.

Answer. Yes.

Fifth Cross-interrogatory. State whether you or the libelant herein paid the General Commercial Company of U. S., Ltd., for said shipment.

184 Answer. The shipper drew on the consignee at sight for value of shipment and the sight draft was paid on presentation.

Sixth Cross-interrogatory. If so, state the amount of such payment, and produce and attach to your answer the original draft so paid, if it is now in your possession, and, if not now in your possession, state what has been done with it, if you know.

Answer. It is impossible to state the exact amount of the draft, but it was something like $22,000.00. The original draft is not in my possession nor do I know what has become of it.

185 *Stipulation.*

It is hereby stipulated and agreed that if Ernest J. Pearce, master of the schooner St. Johns, N. F., were present and called as a witness he would testify as follows:

"The Schooner St. Johns, N. F., left New York City at noon, June 19, 1918, on her maiden voyage to South America. She carried approximately twenty-nine hundred (2,900) tons of general cargo, including a deckload of rosin in barrels. Destination—Rio de Janeiro, Brazil.

Fine weather was our good furtune until the twenty-second of June, 1918, when, in Latitude 39 North, Longitude 68 West, we encountered a severe gale from the southeast.

At 9 A. M. on the 22nd, the flying jib stay carried away. Took in the spanker sail at 9:30 A. M. and kept off a bit to ease vessel, she being on the starboard tack.

At 3 P. M. the gale increased to hurricane force. In order to have the ship under immediate control, I kept her off before the mountain seas. The green seas were making sweep of her, forward and aft. Took in all sail and ran under bare poles.

At 4 P. M. the vessel was laboring heavily. The deckload of rosin in barrels, washed adrift and did considerable damage aft to deck and rails before we could get the loose barrels overboard.

186 At 5 P. M. a huge sea came over aft, damaging the life boat slightly and stove in after-starboard port of cabin. Some water found its way into the cabin before the damaged port was temporarily repaired.

At 10 P. M. the sea had subsided somewhat. The gale had abated to a calm. It was good to breathe easy again.

Sunday, June 23, 1918.—For the good of the ship, cargo, and everybody concerned, I ordered the rosin on deck to be thrown into the sea. In its present unseaworthy condition, it would prove fatal to the lives and ship if another storm were met with.

On June 28, we ran into another severe storm from the southeast that lasted for two days. The bow ports started leaking during this gale. We secured them the best we could.

We were favored with fine weather and light winds until the 18th of August. On this day, in Latitude 17 South, Longitude 36 West we met a gale from the south. This blow was not a severe one and no apparent damage was sustained.

On August 22, 1918, Latitude 21–50 South, Longitude 39 West we had a moderate gale from the south west accompanied with heavy sea.

The remainder of our trip was without incident.

We arrived at Rio de Janeiro on the twenty-sixth of August at 9 A. M."

187 and that if Frank E. Steele were present and called as a witness he would testify as follows:

"I was First Mate of the American schooner St. Johns, N. F., which is a wooden five masted vessel, built in 1918, at Bath, Maine. I was aboard the vessel during the entire first voyage from New York to Rio de Janeiro, Brazil, and return. I have been at sea for about thirty-five years and have sailed all over the world in steam vessels and sailing ships, having held a first mate's certificate at least for the fifteen years past.

I remember a shipment of 800 barrels of rosin which we took on as our deckload. This rosin was well stowed and boarded over with planks, in addition to which I personally had at least six heavy grip chains drawn over the top of the deckload with turn buckles so as to make all fast. I was aboard the vessel when we sailed from New York on June 19, 1918, and the vessel was in a thoroughly seaworthy condition. After we were at sea a few days, we met with a wind storm, practically a hurricane, in the course of which it became necessary to jettison this entire deckload. I quote from the ship's log, the following entries:

'June 22, 1918:

'(Day opened with fine weather and moderate wind and sea).

188 '7 A. M. Weather looks badly. Winds: S. S. E. Changing to S. W. and S. S. W.

'Took in all light sail at 6 A. M.

'9 A. M. Blowing fresh. Flying jib stay carried away but saved the sail.

'Took in spanker at 9:30 and kept off to N. E. to secure flying jib.

'12 Noon. Blowing a gale S. S. E. Gale increasing in force and blows with hurricane severeness.

'Lowered all sail at 3 P. M. and kept off North, too much wind.

'Deck load of rosin in barrels got adrift at 4 P. M. when ship was laboring heavily and seas coming over fore and aft. Had to throw several barrels overboard that were adrift aft, and tearing up the deck, aft of #4 hatch.

'5 P. M. A huge sea came over aft, did some damage to life launch besides stoving in after port, starboard side of cabin.

'A nasty storm. Wind down to a calm at 10 P. M. Running before mountain seas—Wind: West.

'June 23, 1918:

'Ship working so badly with heavy deckload which was all adrift, took the only initiative for the good of the ship and cargo and started heaving the deckload overboard (7 A. M. Sunday, 23rd of June, 1918, Civil Time).

189 '1 P. M. Made sail and headed ship to south and east; the sea having gone down somewhat with a light breeze from the west.

'Deckload nearly all overboard at 5 P. M.

'7 P. M. Fine weather again. Wind: N. W.
'June 24, 1918:
'9 A. M. The last of the deck load overboard.'

I had a short conference with Captain Pearce when the deck load began to break up, and in answer to his questions I stated in my opinion that to throw overboard the deckload was the only thing we could do under the circumstances. In fact, several of these barrels of rosin having gotten loose bounded up and down the after deck tearing great gashes in the planks of the deck, and we could not have managed the sails and the vessel in any kind of a blow as long as we had this deckload aboard. After the rosin was thrown over board, we got along much better and were able to manage the sail and the ship in the remainder of the heavy weather which we encountered on this voyage?"

190 And it is further stipulated and agreed that this stipulation may be used as evidence with the same force and effect if said Ernest J. Pearce and Frank E. Steele testified as witnesses in this case as aforesaid.

Dated New York, June 6, 1921.

CROWELL & ROUSE,
Proctors for Libelant.

HAIGHT, SANDFORD, SMITH & GRIFFIN,
Proctors for Claimant.

(Here follow reproductions of exhibits, marked pages 191-216, inclusive.)

191

Libelant-Appellee's Exhibit A-1

TELEPHONES { 81 / 82 / 410 } JOHN

ACCOUNTS PAYABLE BY CHECK ONLY

SHIPMENTS MADE FROM SAVANNAH, GA. BRUNSWICK, GA. CHARLESTON, S.C. WILM'G'TON, N. C. PENSACOLA, FLA. MOBILE, FLA. NEW ORLEANS, LA. JACKSONVILLE, FLA. PENSACOLA, FLA. DAILY PORT, WEST.

"EXPORT" Trade a Specialty.

DUPLICATE

NEW YORK June 7,1918 19

Messrs. General Commercial Co BR 131

To THOMAS SEALY, Dr.

Rosin, Spirits of Turpentine

MAKERS OF THE "PINE TREE" STANDARD AND "PARAGON" BRANDS SPIRITS OF TURPENTINE

SMOKER IN REFINED SUGAR FOR EXPORT

AND CHEMICALS FOR SOAP AND PAPER MANUFACTURERS

Soda Ash, Caustic Soda, Silicate of Soda,

ROSIN SP'S. TURP. TAR

PITCH OAKUM BRIGHT VARNISH

ROSIN OILS, ETC.

OFFICE 138-140 FRONT STREET NEW YORK

WORKS 529-535 COLUMBIA ST. BROOKLYN

LAWRENCE M. VAN DOLEN, MANAGER

BLEACHING POWDER FISH AND PAINT OILS BOILED PARAFFIN WAX LINSEED OILS

Almeko	800 Bbls. K Rosin				
Rio	wg 248980 lbs/gross		3.90 fas		7913.05
			Less 1%		79.13
	tare 20%				7833.92
	Sch.St.Johns N.F.				
				#1263	
		397196			
		317696			
	JUN 19 1918 INVOICED #56			Kl. 180692	
				Kl. 149076	
JUN 11 1918	Ø				JUN 14 PAID

Libelant-Appellee's Exhibit A-2

ACCOUNTS PAYABLE BY CHECK ONLY

"EXPORT Trade a Specialty."

NEW YORK June 7, 1918 19

Messrs. General Commercial Co BR 118

THOMAS SEALY, Dr.

Rosin, Spirits of Turpentine

Soda Ash, Caustic Soda, Silicate of Soda,

BROKER IN REFINED SUGAR FOR EXPORT

AND CHEMICALS FOR SOAP AND PAPER MANUFACTURERS

ROSIN PITCH SPTS. TURP. DARUN TAR BRIGHT VARNISH ROSIN OILS, ETC.

OFFICE FOR 130-140 FRONT STREET NEW YORK

WORKS 389-393 COLUMBIA ST BROOKLYN

LAWRENCE M. VAN DOLEN, MANAGER

BLEACHING POWDER FISH AND PAINT OILS BEES, PARAFFIN WAX LINSEED OILS

Almirko	300 Bbls. K Rosin			
Rio	wg 148170 lbs/gross	6.90 fbs		4709.69
		Less 1%		47.10
	tare 80%			4662.59

Sch.St.Johns N.F.

JUN 19 1918
INVOICED

JUN 11 1918 JUN 14 PAID

Libelant-Appellee's Exhibit B

THE NATIONAL CITY BANK OF NEW YORK

FOREIGN DIVISION

New York, SEP 17 1918

Dear Sirs:

We beg leave to advise you that the following draft, purchased from you, has been duly paid.

YOUR NO.	DISCOUNTED	OUR NO.	DRAWEE	AMOUNT	PAID
1[illegible]	4[illegible]	290291	La Compañia [illegible] Com.	2366.17	Aug 7/18
135	6/1	290276	" " "	1102.34	Aug 1/18
134	6/1	290191	" " Rio " "	21037.00	Aug 2/18

Respectfully yours,

THE NATIONAL CITY BANK OF NEW YORK

FOREIGN DIVISION

SUBJECT TO ADJUSTMENT OF CHARGES, WHERE NECESSARY.

General Commercial Co

90 Trinity St

NYC

Libelant-Appellee's Exhibit C

S.A. Companhia Geral Commercial do Rio de Janeiro
The General Commercial Company Limited
Rua 1 de Março 36
End. Tel. "RIMINKO"
CODIGOS: A.B.C. 5th LIEBER'S WEST. UNION. RIBEIRO A.B.C. 5th LETRAS GENERAL, A-Z. MASTERS.
CAIXA POSTAL Nº 400
TELEPHONE NORTE 4971

RECEIVED
NOV 14 1918
Answ'd
File
No. 2194

REGISTRADO

Rio de Janeiro,
Sept. 16th, 1918.

The General Commercial Co. Ltd. of U.S.,
90 West Street,
New York, N. Y.

SUCCURSAES E AGENCIAS
EUROPA:
LONDON
PARIS
BARCELONA
AMSTERDAM
COPENHAGEN
CHRISTIANIA
NORRKÖPING
PETROGRAD
MOSCOU

AMERICA:
NEW YORK
PERNAMBUCO
BAHIA
SANTOS
SÃO PAULO
BUENOS AIRES
VALPARAISO
SANTIAGO
LA PAZ

ASIA:
YOKOHAMA
MANILA
OMSK
TSCHITA
VLADIVOSTOK

Dear Sirs:

800 BARRELS ROSIN X PER S/V ST. JOHN On the 10th of September we cabled you that the S/V St. John had not discharged the 800 barrels which you shipped per same, and that it was stated that these 800 barrels had been thrown overboard. We were not then in possession of full particulars of the case, and thought that perhaps the goods had really been left behind, so we mentioned this in our telegram.

In the light of further information, however, we see that the 800 barrels were really shipped, but, in consequence of a hurricane, which caused the high seas to wash the decks of the vessel and the barrels to get loose and to cause damage to the ship, the captain had same thrown overboard.

We have already procured ourselves a certified copy of the protest filed by the Master of the ship at the American Consulate, and we shall likewise secure a certificate from the Custom House here, to the effect that the 800 barrels were not discharged here; we also filed a claim with the Steamship Agents here, to whom we presented our bill for the value of this Rosin, with the view of provoking a protest from them and some declaration on their part as to who should be liable for the loss. We think we have a perfectly clear case against the Insurance Company and we are using our best endeavors to send you all the necessary papers by this bearer, so that you may take the matter up with the Insurance Underwriters at your end.

In the course of a conversation had this morning between the undersigned and the representatives of the ship owners, it was stated by the latter that the ship always reserved the right of placing part of the cargo on deck. We hold, without

194

No. 229

The General Commercial Co. Ltd. of U.S. contesting this right, that, in such event, the shippers should have been promptly notified, so that they might in turn, protect themselves with insurance to cover deck cargo. We have no doubt but that the proper steps were taken at your end to fully protect the cargo, and we are simply mentioning the fact so that the matter will ever be present before you in the future, as you can easily realise how very important it is that all cargo should be properly insured.

We shall write you further about this matter in the course of a day or so.

The fact that this shipment was lost means quite a lot to us as Rosin is very scarce in the market just now, and we expected to make a good profit on these 800 barrels.

Furthermore, your goodselves drew on us at sight for the value of this shipment, your bill was promptly paid by us and we drew on customers in cover thereof; as it happens, we now have to refund to customers the amounts which they paid in so that we may be entitled, ourselves, to the insurance, and you can easily understand how this will affect us at the present moment.

In our same telegram of September 10th, we requested you to always insure future shipments at 20%, instead of 10% above the cif Rio price. In normal times, of course, a 10% excess is quite sufficient, but now-a-days it is so hard to get goods, that one necessarily wishes to make some profit on the goods one does receive, so, if the cargo is lost, it is only fair that the amount insured should, in itself represent some little profit.

Furthermore, you will appreciate that, whilst you will insure the goods at the cif Rio cost plus 20%, we must, in the case of accident to the cargo, pay our customers an amount equivalent to the selling price plus 10%, so that it is quite important that we should have some little margin as, otherwise, whenever a cargo is lost or damaged, we shall really have a loss even though the cargo be insured.

With nothing further at this writing, we remain

Very truly yours,

[illegible] Commercial do Rio de Janeiro

[illegible]
Director-Gerente

EEB:BK

A Companhia Geral Commercial do Rio de Janeiro
The General Commercial Company Limited
Rua 1 de Março, 56

Cable Address "ALMINKO"
CODES: A.B.C. 5th EDITION, WESTERN UNION, RIBEIRO, A.B.C. 5th & 6th EDITIONS, GENERAL, A-1, MASTERS.

CAIXA POSTAL Nº 400
TELEPHONE NORTE 4071

ALMINKO

EUROPA:
LONDON
PARIS
BARCELONA
AMSTERDAM
COPENHAGEN
CHRISTIANIA
NORRKÖPING
PETROGRAD
MOSCOU

AMERICA:
NEW YORK
PERNAMBUCO
BAHIA
SANTOS
SÃO PAULO
BUENOS AIRES
VALPARAISO
SANTIAGO
LA PAZ

ASIA:
YOKOHAMA
MANILA
OMSK
TSCHITA
VLADIVOSTOCK

Rio de Janeiro.
Dec. 19th 1918.

E F
87 39 6/01

#405

The General Commercial Co., Ltd
#90 West Street New York City

Dear Sirs:-

SHIPMENTS OF VITRIOL PER S/V MANX KING AND ROSIN K. PER S/S ST JOHN.

We duly received your telegram #96, of December 6th, which reached us on the 15th and #97, of December 10th, which reached us on the 12th.

In the first of these telegrams you asked us whether we had sent you the shipping documents complete covering the goods which you shipped out on the above two vessels and which were lost; and this question you repeat in regard to Vitriol in your 2d message referred to above. In your #97 you also tell us not to draw on you as suggested in our telegram of the 7th instant but we regret that this telegram of yours came too late as we had already drawn on you for the value of the Vitriol shipped by the S/V Manx King, plus 10% for which you should have insured same. In the same draft we included the value of sundry cheques we had sent you for collection in the States.

We have already written you of this and so do not think it necessary to go into the matter again at this writing. We telegraphed you to this effect in our #121 of December 16th at the same time advising you that the documents of the Vitriol by the S/V Manx King had been sent you with our letter #296 of November 11th.

In regard to the Rosin F it was our intention to draw on you for $23,200.00 value insured as intimated in our telegram #120 of December 16th but we find that no bank in this city will discount a draft of ours on

A. S. A. GERAL COMMERCIAL
TO
RIO DE JANEIRO
The General Commercial Co. Ltd.)

196

#405

The General Commercial Co. New York.

you for such an amount and for a transaction of such a nature. Consequently, kindly take into consideration our remarks in previous correspondence where we asked you to attend to the collection of these $25,200.00 from the insurance company and to remit same to us by telegraph immediately after collection.

Replying to the question embodied in your telegram #397 of December 12th, as to whether the bills of lading of the St. John showed that the goods were shipped on deck, we telegraphed you on December 16th, our #120, to the effect that the Bills of lading bore no stamp indicating that the goods were shipped on deck. In the same telegram we referred to our letters #229 and #231 from which you will have seen that this same question was brought up here by the Cia Expresso Federal, Agents for the ship-owners. These people claimed that the ship, as per clause §20 of the bills of lading, was entitled to carry cargo on deck. We promptly replied to this letter of the Cia Expresso Federal under date of September 17th and wish to hand you herewith a copy of our letter in question as well as of their letter to which it replies. You will see that we made it very clear that the ship would be held liable for any damage or loss to cargo should such damage or loss be directly traceable to the fact that the cargo was on deck instead of below. So far as we are able to gather the whole matter is apparently more up to the ship-owners than to the Insurance Company for if the goods were shipped on deck and you were not duly notified to this effect, then you probably did not cover yourselves by insuring deck cargo and the ship is liable for the damages resulting from their placing on deck cargo booked for under-deck space. At any rate, this is a matter for you to arrange with the ship-owners and the Insurance underwriters.

Now, Gentlemen, you will appreciate that we protected your interests by paying at sight your draft in cover of this Rosin although the Rosin did not get here. We, consequently, look forward to you to protect our interests and help us out as, of course, you will appreciate that we cannot very well afford to be out $25,200.00

In the meantime we beg to remain,

Very truly yours,

S. A. Importadora Geral Commercial do Rio de Janeiro

Jap. M. V. Bleichrodt
Director-Gerente

Jan/Jalabert returned

Jack

EFB:G
Encl: copies of
2 letters.

x The same in re the strike
Mr. Mandeville

Copy of aletter written by The General Commercial Co,Ltd, of Rio de Janeiro,

To:-

Cia Expresso Federal.
48.Rua da Alfandega.
Rio de Janeiro.

Rio de Janeiro,
September,17-th,1918.

Dear Sirs:-

We beg to own the receipt of your favour of September, 16-th, in regard to our letter of the 14-th inst. anent our claim on 800.Barrels of Rosin K. consigned to us and short discharged ex Schooner St.John.

We note that these 800.Barrels were thrown overboard by the captain of the Schooner who was prompted in so doing by the stress of the weather.-

With reference to the closing paragraph of your favor un-der reply,we shall be very glad indeed to get from you the certificate which you so kindly offer us to theeffect that the said cargo was not discharged in this port and the reasons therefor.- We would be very much obliged to you if you would have this certificate made out,there-fore and duly legalised before the American Consulate General,it being understood,of course, that the usual Consular fees in this connection will be for our Account.-

In regard to your statement that Article 20. of the Bill of Lading reserves the ship the right to carry cargo on deck, we beg to reiterate our statement of yesterday to the effect,that, whilst not contesting this right, we, nevertheless,hold that should the ship elect to carry on deck part of the cargo booked for under-deck space,the shippers must be duly notified of the fact, in order that they may take the proper steps to secure the necessary protec-tion in the way of an Insurance policy to cover deck-cargo. Therefore, if the ship placed on deck,cargo which should have been stowed under deck and failed tonotify the shippers of their having done so ,we maintain that the ship is liable for any damage or loss to said cargo,should such damage or loss be directly traceable to the fact that the cargo was on deck instead of below.-

We are simply filing this exception with your good-selves for the sake of regularity,inasmuch as with you,we feel quite confident,there will be no question on the part of the Insurance Underwriters to promptly settle the claim which we will,in due course,file with them for the loss of the said 800.Barrels,and we take this opportunity to extend to you our very best thanks for the assistance which you assure us that Messrs.W.A S.Job & Co, will render us.

Very truly Yours,

EEB/SK.

Copied T-i

y of a letter from the COMPANHIA EXPRESSO FEDERAL, RIO DE JANEIRO
.Rua Alfandega
-gs

Rio de Janeiro,
September, the 16-th, 1918.

A Companhia Geria Commercial,
de Rio de Janeiro.
Rua 1.de Março No:96.
Rio de Janeiro.

Dear Sirs:-

In reply to your letter of 14.of September 1918 in connection with your claim on 800.Barrels of Resin, consigned to your Company, which were thrown overboard by the Captain of the schooner St/John, we beg to advise you, that this cargo was thrown overboard by order of the Captian by reason of stress of weather.-

Please note that the way Bill states that "The carrier shall not be liable for loss or damage occasioned by, due to ,or arising, from causes beyond the carriers control, by the Actof God, vis major., by collision, stranding, jettison, or wreck, perils of the sea or other waters, by fire from any cause or wheresoever occurring" etc.

Also please note that the Way Bill by Article 20. reserves the right to carry cargo on deck.-

The Captain made written declaration upon arrival to the American Consulate General, that this cargo was thrown overboard due to stress of weather, and doubtless a copy of this can be obtained which will protect your interest when you present your claim to the Insurance Company.

The undersigned act for W.& S. Job & Co., only in the clearance, discharge and loading of the vessel. Commercial Claims of whatever nature must be presented to W.& S. Job & Co., in New-York.-

We will be glad to give you a certificate, stating that your cargo was not discharged here and the reasons therefore;- we can assure you that W.& S.Job & Co. in New-York will assist you in every way in the protection of your interests.

Yours truly.

TPI/RL.
Copied by T-1

Libelant-Appellee's Exhibit C

S. A. Companhia Geral Commercial do Rio de Janeiro
The General Commercial Company Limited

Rua 1 de Março 96

Caixa Postal Nº 400
Telephone Norte 4071
ALMINKO
Em Rs. "ALMINKO"
CODIGOS: A.B.C. 5th LIEBER'S, WEST UNION, RIEMANN, A.B.C. 5th & LEYRAS, GENERAL A-Z, MASTERS.

RECEIVED
JAN 24 1919
Answd.
File

Rio de Janeiro.
Dec. 8th, 1918..

E. G. P. 4 3 1 1 1

SUCCURSAES E AGENCIAS:

EUROPA:
LONDON
PARIS
BARCELONA
AMSTERDAM
COPENHAGEN
CHRISTIANIA
NORRKÖPING
PETROGRAD
MOSCOU

AMERICA:
NEW YORK
PERNAMBUCO
BAHIA
SANTOS
SÃO PAULO
BUENOS AIRES
VALPARAISO
SANTIAGO
LA PAZ

ASIA:
YOKOHAMA
MANILA
OSAKA
TSUNTA
VLADIVOSTOCK

#382

The General Commercial Co., Ltd. of U.S.
#90 West Street, New York City.

Gentlemen:

In our letter #361 of December 3rd we asked your goodselves to remit to us by telegraph, as soon as you had collected same from the insurance underwriters, the $23,200.oo insurance value of the 800 barrels of Rosin K shipped by the S/V St John, N.F.

Coming to think better of the matter, however, we decided that it would be best for us to draw on you at 90 days sight for this amount pinning to our draft all the documents referred to in our letter #362, that is to say, the bills of lading in our possession, copy of Consular Invoice and the three certificates which we obtained from the custom-house.

To this effect we cabled you on Dec. 7th as we prefer to have your formal authority to issue this draft before doing so.

We are awaiting with interest your further advices in the matter,

FFB:C

Very truly yours,

S. A. Companhia Geral Commercial do Rio de Janeiro

Director Gerente

200

Claimant-Appellant's Exhibit 1

N.° 16

Order placed by: / Pedido que faz: S. A. Companhia Geral Commercial do Rio de Janeiro.

Date / Data: May 27th 1918.

With / A: The General Commercial Co., Ltd. of U.S. New York.

RECEIVED
JUL 30 1918
File - -

through their representative / por intermedio de seu representante: S. A. Companhia Geral Commercial do Rio de Janeiro
The General Commercial Company Ltd.

RUA 1° DE MARÇO, 90
RIO DE JANEIRO

Consign to: / Consignado: S. A. Companhia Geral Commercial, do Rio de Janeiro.

Ship through or via: / Remetter por intermedio de: by steamer immediately.

Marine Insurance: / Seguro Marítimo: to be covered by you

War Risk Insurance: / Seguro de Guerra: to be covered by you.

Terms: / Condições: 90 d/a-

Remarks: / Observações: Cable when shipping stating steamer's name.

SHIPPING MARKS / MARCA
ALMINKO
RIO DE JANEIRO

Quantidade Quantity		ARTIGO DESCRIPTION
		As per our cable of May 27th.
600	bbls	each with 500 lbs ROSIN X at the price of $115.00 per ton, gross/Net, c.i.f. Rio.

S.A. Companhia Geral Commercial do Rio de Janeiro

[signature]

Diretores Gerentes

6/25/18
INVOICED
Inv. 56

Claimant-Appellant's Exhibit 2-A

PERMIT NO. 97

W. & S. JOB & CO., INC.

29 BROADWAY

201 TRIPLICATE

TO THE RECEIVING CLERK PIER 11 NEW YORK July 19

RECEIVE FROM General Commercial Co. Ltd of U.S

FOR S S SCHEDULED TO SAIL ON

FOR Rio de Janeiro, Brazil

BE DELIVERED

QUANTITY	PACKAGES	CONTENTS	QUANTITY	PACKAGES	CONTENTS
500	Bbls	Rosin In or on deck ships option			

This permit is issued upon the following terms and conditions:

1. No goods received after 3 P. M. two days prior to scheduled sailing of steamer. Shippers' attention is called to the necessity of making entry within the time specified in this permit.
2. No goods received unless accompanied by this Company's form of dock receipt properly filled out.
3. Bills of lading and consular invoices (when required) must be presented at Freight Office, Room 3411, 39 Broadway, two days prior to sailing of steamer.
4. The goods or any part thereof may be held by the Steamship Company for the next steamer of the same line; and are received subject to delay, damage or default from act or consequence of riots, strikes, stoppages of labor and like disturbances.
5. All goods must be plainly marked and show port of destination for which they are intended, otherwise the Steamship Company will not be responsible for resultant delivery.
6. Cotton, opium and valuables must be packed in strong, properly screwed and nailed wooden packages and notice given to the Company before shipment.
7. Attention of shippers is called to Section 232 of the Penal Code of the United States with regard to the shipment of explosives or other dangerous articles.
8. Freight rates are adjusted on the basis of a valuation not exceeding $100 per package; if the value of the goods exceeds such valuation, the same should be declared and a rate of freight based thereon will ARBITRARILY BE CHARGED AT TIME OF TAKING ONE THIRD PERSENT, otherwise the goods are received subject to the regular bill of lading provision limiting the value in location and not exceeding $100 per package and no claims will be made thereon.
9. The Steamship Company's regular bill of lading shall be issued for the shipment and shippers are understood to have accepted themselves thereby. The Steamship Company shall not however be responsible for the goods as carrier until the goods are actually loaded on the Steamer; until such loading it shall be liable only as an ordinary bailee, for loss or damage caused by its fault, and subject also to all conditions, exceptions and limitations of liability contained in its regular bill of lading.

SHIPPERS DECLARATION NO.

EXPORT LICENSE NO.

W. & S. JOB & CO., INC.
AGENTS
PER W. & S. J.

Claimant-Appellant's Exhibit 2-B

PERMIT NO. 126

W. & S. JOB & CO., INC.

29 BROADWAY

TRIPLICATE

TO THE RECEIVING CLERK PIER 15 Brooklyn NEW YORK 6/6/ 19 18

RECEIVE FROM General Commercial Co. Shipper U.S

FOR S/S St. Johns N.B. SCHEDULED TO SAIL ON June 10

Rio de Janeiro

BE DELIVERED June 6 18 a-m

QUANTITY	PACKAGES	CONTENTS	QUANTITY	PACKAGES	CONTENTS
300	Barrels	Rosin On or under deck ships option			

This permit is issued upon the following terms and conditions:

1. No goods received after 3 P. M. two days prior to scheduled sailing of steamer. Shippers' attention is called to the necessity of making entry within the time specified in this permit.
2. No goods received unless accompanied by this Company's form of dock receipt properly filled out.
3. Bills of lading and consular invoices (when required) must be presented at Freight Office, Room 3411, 39 Broadway, two days prior to sailing of steamer.
4. The goods or any part thereof may be held by the Steamship Company for the next steamer of the same line; and are received subject to delay, damage or default from act or consequence of riots, strikes, stoppages of labor and like disturbances.
5. All goods must be plainly marked and show port of destination for which they are intended, otherwise the Steamship Company will not be responsible for resultant delivery.
6. Cotton, opium and valuables must be packed in strong, properly screwed and nailed wooden packages and notice given to the Company before shipment.
7. Attention of shippers is called to Section 232 of the Penal Code of the United States with regard to the shipment of explosives or other dangerous articles.
8. Freight rates are adjusted on the basis of a valuation not exceeding $100 per package; if the value of the goods exceeds such valuation, the same should be declared and a rate of freight based thereon will ARBITRARILY BE CHARGED AT TIME OF TAKING ONE THIRD PERSENT, otherwise the goods are received subject to the regular bill of lading provision limiting the value in location and not exceeding $100 per package and no claims will be made thereon.
9. The Steamship Company's regular bill of lading shall be issued for the shipment and shippers are understood to have accepted themselves thereby. The Steamship Company shall not however be responsible for the goods as carrier until the goods are actually loaded on the Steamer; until such loading it shall be liable only as an ordinary bailee, for loss or damage caused by its fault, and subject also to all conditions, exceptions and limitations of liability contained in its regular bill of lading.

SHIPPERS DECLARATION NO. 207640

EXPORT LICENSE NO. 3077608

W. & S. JOB & CO., INC.
AGENTS
PER

Claimant-Appellant's Exhibit 3-A

THE GENERAL COMMERCIAL COMPANY, LTD.

—OF—

UNITED STATES

295 BROADWAY

NEW YORK December 11th, 1918.

IN YOUR REPLY PLEASE REFER TO:

CHEMICAL DEPT

CABLE ADDRESS "ALMINKO"

Messrs. W. & S. Job, Inc.,
Agents for St. Johns N.F. Shipping Corp.,
29 Broadway,
New York City.

Gentlemen:

According to report received from the Companhia Expresso Federal, and according to Marine Extended Protest, signed by the Vice-Consul of the United States of America, in charge of the Consulate General in Rio de Janeiro, Brasil, the sailing vessel, "St. Johns, N. F.", which sailed from New York on the 19th of June, 1918, carrying a cargo of 800 barrels of Rosin for us, arrived at Rio de Janeiro without this cargo on board. According to the Marine Extended Protest, it was necessary to unload this cargo from deck on account of the severe weather encountered by the vessel during the voyage.

These goods were covered by us against War & Marine Insurance, but as the bill of lading issued by you did not show any evidence that the goods were shipped on deck, as was the case, we did not cover the goods for shipment on deck. As you did not stamp the bill of lading "on deck", you will understand that you are responsible for the loss suffered in accordance therewith, and we are enclosing our debit note amounting to $25,200.00, which is the amount we have covered against War & Marine Insurance, and trust that you will send us a check for this amount.

We have copy of the bill of lading in our possession, and other documents, as Insurance certificates, Marine Extended Protest, and letter from the Companhia Expresso Federal, all of which you may investigate whenever you should so desire.

Awaiting to hear from you at your earliest convenience, we remain

Yours very truly,

THE GENERAL COMMERCIAL CO. Ltd. [illegible]

AH:FM

Claimant-Appellant's Exhibit 3-B

New York, December 11, 1918

W. & S. Job & Company, Inc.,

Agents for St. John's N. F. Shipping Corp., 29 Broadway, New York

IN ACCOUNT WITH

THE GENERAL COMMERCIAL COMPANY, LTD.

—OF—

UNITED STATES

195 BROADWAY

n/m #418

Debit

Re. B/L #15 covering 800 bbls. Rosin for Rio de Janeiro by Schooner St. John's, N. F.

To Amount of marine insurance covering the shipment which was thrown overboard on voyage. As the Bill of Lading carried no advice that the goods were shipped on deck, the underwriters decline to admit our claim for the loss as the insurance did not cover deck risk. $23,300.00

Claimant-Appellant's Exhibit 4

THE GENERAL COMMERCIAL COMPANY, LTD.
—OF—
UNITED STATES

299 BROADWAY
New York

February 7, 1919.

Claim #6

IN YOUR REPLY PLEASE REFER TO:
Department #1.

Messrs. W. & S. Job & Co.,Inc.,
29 Broadway,
New York City.

Gentlemen:-

Referring to the claim which we made against you, as per our letter of December the 11th, 1918, for the loss of 800 barrels of Rosin shipped by your schooner "St.Johns N.F." to Rio de Janeiro, and our various conversations meanwhile, all of which have brought no result, we have come to the conclusion that this is after all hardly a matter between you and ourselves, but as far as we are concerned, the insurance underwriters must be responsible towards us and they will then have to attend to their claim against you afterwards. We base this upon the fact that you gave us clean B/L, showing no indications that the goods had been shipped on deck and you gave us no other notice to that effect, wherefore we insured in good faith only against ordinary risk as if shipped under deck, and when we give the underwriters documents to substantiate this, you will have to be responsible to them for having stowed the goods differently.

Very truly yours,

THE GENERAL COMMERCIAL COMPANY, LTD. OF U.S.

Pres.

VH:MK

Claimant-Appellant's Exhibit 8

THE GENERAL COMMERCIAL COMPANY, LTD.
OF
UNITED STATES
299 BROADWAY
New York

December 23d, 1918.

CABLE ADDRESS
"ALMINKO"

CODES USED:
LIEBER'S
BENTLEY'S
A.B.C. 5TH EDITION
WESTERN UNION
PRIVATE CODES

BRANCH OFFICES
AND
AGENTS IN:

AMERICA:
BAHIA
BUENOS AIRES
CEARÁ
CURITYBA
LA PAZ
PERNAMBUCO
RIO DE JANEIRO
RIO GRANDE DEL SUD
SAN FRANCISCO
SANTIAGO DE CHILE
SANTOS
SAO PAULO
VALPARAISO

ASIA:
HARBIN
IRKUTSK
OMSK
OSAKA
TOCHITA
VLADIVOSTOK
YOKOHAMA

EUROPE:
AMSTERDAM
CHRISTIANIA
COPENHAGEN
LONDON
MARSEILLE
MOSCOW
PETROGRAD
STOCKHOLM

AFRICA:
BENA
IBO
MOZAMBIQUE
PARAPATE
PORTO-AMELIA
SUELIMANE
CAPETOWN

IN YOUR REPLY PLEASE REFER TO:
CHEMICAL DEPT

Messrs. Johnson & Higgins,
49 Wall Street,
New York City.

Gentlemen: Att. of Mr. Hatch

Referring to our telephone conversation of today, we have been requested by Messrs. W. & S. Job & Co. Inc., to approach you in regard to our claim amounting to $23,200. covering a loss sustained by us on account of their negligence to specify on their ocean bills of lading that our shipment of 800 barrels of Rosin to Rio de Janeiro, on the S/V "St. Johns, N. F." went forward "on deck". As the bills of lading did not show any evidence that the goods were shipped "on deck", we did not take out insurance for shipment "on deck", and as the goods were thrown overboard, we are unable to collect our claim from the underwriters and must therefore hold the steamship company responsible.

We are holding here in our office, copies of insurance policies and bill of lading which you may inspect whenever you should so desire. The original bills of lading are being sent from Rio de Janeiro direct to us on the S/S "Saga", scheduled to sail from Rio de Janeiro on the 23d of December. We may mention that we are in receipt of a cable from our branch house in Rio de Janeiro to the effect that none of the bills of lading in their possession shew that the goods have been shipped "on deck".

We await to hear from you at your earliest convenience, and remain

Yours very truly,

THE GENERAL COMMERCIAL CO. LTD. OF U. S.

Jno. F. Colst

AH:FH

Claimant-Appellant's Exhibit 7

Exhibit for Identification
Claimant's No. 7
June 13, 1921

NO. 44 #1

W. & S. JOB & CO. INC.

29 BROADWAY, NEW YORK

19

Received in apparent good order, from H. General Commercial Co.
for shipment by the S. S. St. John N. B. to Rio Brazil
at the shipper's risk from fire, flood or other causes beyond our control, and subject to the conditions expressed in our vessel form of Bill of Lading, including liberty to substitute any other vessel.

MARKS AND NUMBERS	DESCRIPTION
ALMINKO RIO JOB/24	300 Barrels Rosin License 3077608 Dec. 207640

NO B/L ISSUED TO ORDER
PORT OF DESTINATION MUST BE MARKED ON EACH PACKAGE.
N. B. Bills of Lading countersigned by ocean Clearance must be presented not later than one day before date of sailing. When PARCEL RECEIPT is desired, notice to this effect must be given to Receiving Clerk.

Claimant-Appellant's Exhibit 8

Exhibit for Identification
Claimant's No. 8
June 13, 1921

NO. 44 #2

W. & S. JOB & CO. INC.

29 BROADWAY, NEW YORK

19

Received in apparent good order, from H. General Commercial Co.
for shipment by the S.S. Ocean St. John N.B. Rio Brazil
at the shipper's risk from fire, flood or other causes beyond our control, and subject to the conditions expressed in our vessel form of Bill of Lading, including liberty to substitute any other vessel.

MARKS AND NUMBERS	DESCRIPTION
ALMINKO RIO.	300 Barrels Rosin Lic. 861795 Dec. 30 2

NO B/L ISSUED TO ORDER
PORT OF DESTINATION MUST BE MARKED ON EACH PACKAGE.
N. B. Bills of Lading countersigned by ocean Clearance must be presented not later than one day before date of sailing. When PARCEL RECEIPT is desired, notice to this effect must be given to Receiving Clerk.

Claimant-Appellant's Exhibit 11

"Regarding your claim for the loss of Rosin, amounting to $25,200.00, we have placed this claim with the carriers, W. & S. Job & Company, Inc., New York, because of the fact that, as far as we are advised, they failed to state on the Bill of Lading that the goods were carried on deck. As the insurance was merely covering the goods as loaded under deck, we are naturally unable to collect anything from the underwriters as they, of course, decline responsibility for the goods carried on deck of the bark. We have cabled you for the shipping papers and await their arrival any day. It is, of course, necessary to have them in order to convince the carriers of their negligence in making out these papers, and our success in collecting the claim from them hinges on this point. Whenever we collect anything in this claim, we shall render you our Credit Note herefor, and we ask your permission therefore to disregard your Debit Note #55 for $25,200.00, for we can assume no liability whatever for this or any other insurance claims you forward. We consider that we are merely rendering you a service in collecting these claims for you and that we should therefore not be debited for them, especially not if in addition you might choose to calculate interest on these items. We submit that we should not be held responsible nor liable in any way whatever for these losses that are entirely beyond our control. We consider that our responsibility ceases when we have obtained from the Steamship Company a clean Bill of Lading for the goods.

Claimant-Appellant's Exhibit 11-A

S.A. Companhia Geral Commercial do Rio de Janeiro
(The General Commercial Company Limited)

1 Rua 1 de Março 26

Caixa Postal Nº 400

Telephone North 4071

Caba Matriz: Agencia

Rio de Janeiro
March 22, 1919

RECEIVED
ALMINKO
APR 24 1919
4/28

Chemical Dept/

The General Commercial Co.,
295 Broadway,
New York City.

Dear Sirs:

EUROPA:

AMERICA:

ASIA:

ROSIN E S/V ST. JOHN: Referring to past correspondence in this connection and recent cables, we must state that we are greatly astonished at the delay that is taking place in the settlement of our claim. We do not of course know the exact causes that are holding up this settlement but we are sure that we are not responsible for the delay. The goods were shipped out on a sailing vessel, on deck, without any clause printed or stamped on the bill of lading to this effect. So it seems to us that either you were notified by the ship owners that the goods were to be shipped on deck and omitted to cover insurance accordingly, in which event you are, of course, responsible to us, or else the ship owners forwarded the goods on deck and omitted to advise you of this fact, in which event they are certainly liable to you, and you to us, for the value of the merchandise. The insurance company would only be responsible if your goodselves had insured the Rosin as deck cargo; but since this is not evidently the case, we cannot see how you can hold them. Without further explanation from you it would therefore appear that the responsibility lies between your goodselves and the ship owners. We bought these 800 barrels from you c.i.f., that is to say, at a price that included f.o.b. cost, plus insurance, plus freight; so, if the goods were not insured or if proper measures were not taken to adequately protect thecargo, we must look to you for payment of the 800 barrels, since your sight draft was immediately honored by us and you are long since in possession of the value of your invoice covering same. You can readily appreciate that this office cannot afford to be out $25,800 through a neglect of some sort on your part. If, in consequence of this neglect, you are going to have a long suit with the ship owners, it certainly is not fair that we should have to wait until this suit is settled to get our money back.

To bring this matter to a head, we cabled you on the 20th inst, as per our No. 148, that you should remit

No. 14 Sheet 2 March 22, 1919

to

ALMINKO
NEW YORK

the value of this rosin as we were in great need of same and added that if the goods were properly protected there should be no further delay in collecting this amount from whomsoever is responsible and remit to us by telegraph as requested in previous communications; whilst if the goods were not properly protected, your goodselves are to blame for this and there is no reason why we should wait until your suit is settled. The stand you have taken in the matter would mean that in the event of your losing the suit, we would be out $23,200,-which is not the idea at all, and we certainly cannot view things in this light.

In your favor $654, page 52, dated January 9th, you state that you considered that you are simply rendering us a service in collecting these claims for us. This is rather a peculiar way of looking at things. You add that you consider your responsibility to cease when you obtain from the steamship company a clean bill of lading for the goods. But it is a doubtful question whether the bill of lading, in thiscase, can be considered "clean" inasmuch as no provision has been made in same for shipment on deck and the goods were shipped on deck. Then,again, you sell us c.i.f. and we, therefore, have the right to look to you for adequate insurance, and if the insurance effected was insufficient, you are accountable to us for whatever losses might result from your oversight or negligence.

Yours very truly,

S [illegible] Co. of Rio de Janeiro

Director-Gerente

HRB:MMC

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Claimant-Appellant's Exhibit 12

A. A. Companhia Geral Commercial. Rio de Janeiro

(A. A. General Commercial Company Limited)

Rua Marcos 96

Caixa Postal Nº 400

Telephone Norte 2611 4071 5821

Cable Address "ALPHABAC"

CODES: A.B.C. 5th EDITION, WESTERN UNION, MODERN A.B.C. 5th EDITION, LIEBER'S GENERAL A.1., RAMSDEN, BENTLEY'S

CASA MATRIZ:

A. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO

CAPITAL 70 MILHÕES DE COROAS

COPENHAGUE

SUCURSAES E AGENCIAS:

EUROPA:

LONDON

AMSTERDAM

CHRISTIANIA

STOCKHOLM

BARCELONA

HAVRE

PETROGRAD

BERGEN

AMERICA:

NEW YORK

SÃO FRANCISCO

BOSTON

SÃO PAULO

BUENOS AIRES

VALPARAISO

LA PAZ

ASIA:

YOKOHAMA

OSAKA

VLADIVOSTOCK

CHEFOO

TSIENTSIN

RECEIVED

SEP 4 1919

MINKO

Rio de Janeiro,
August 7, 1919

General Commercial Co.,
New York City.

Dear Sirs:

(St. John)

ROSIN "K" - shortage of 800 bbls - ex s/s "NEWFOUNDLAND"

We beg to own receipt of your favors

801	of	February	11th,
824	"	"	20
945	"	March	18
965	"	"	24
979	"	"	29
1169	"	May	10
1236	"	June	2
1236	"	"	"
1280	"	May	29
1320	"	June	23.

Before going further into the matter we wish to state that we positively cannot agree with the stand you are taking.

You sold us 800 barrels of Rosin "K" at a certain price, which included cost, insurance and freight. Therefore it was distinctly your part of the transaction to see that the goods were properly covered by insurance, and properly shipped in accordance with the terms of the bill of lading. If the bill of lading had a clause to the effect that the goods could be stowed on deck and you did not cover yourselves by insurance on a deck cargo, then you are responsible to us for any loss resulting through such negligence on your part. There is absolutely no question but that something was not done as it should have been done, else this long suit between your goodselves, the shipowners and the insurance Company would never have arisen. All the documents that could have been sent you, were sent you; and there is nothing more that we can do at this end to help you win your suit and it must be distinctly understood that if you should lose same, we will nevertheless be reimbursed. In your letter #1320 of June 23rd, you transcribe a letter from your lawyer, asking for names and addresses of witnesses who can testify that the vessel arrived but did not discharge her cargo. We are taking the matter up with our custom house broker but we feel quite sure that it will be impossible for us to give you such information. The certified copy of the

U. S. A. CONSULAR GENERAL COMMERCIAL
DO
RIO DE JANEIRO
(The Brazil Commercial Co. Ltd.)

t o
ALMIRKO-- NEW YORK
No.74. page 2
from Rio,
August 7, 1919

protest filed at the American Consulate by the master of the vessel and the official declaration of the custom house that the goods did notdischarge in Rio, are sufficient documentary proof to show beyond a doubt that the 800 barrels were not discharged at Rio de Janeiro. In order to point out how clear our case is, we would state that if we had bought these 800 barrels from some concern outside of our organization and on arrival of the vessel had found that the goods were short, we certainly would not have accepted the draft as we would then not have paid for something which we had not received. As protection to the seller, we would have returned to him the shipping papers duly endorsed and H B would have to fight his case out with the insurance underwriters or the shipowners. It is not just, therefore that simply because we bought these 800 barrels from a Sister Company, that we should stand the loss of the value of same, paid against a sight draft. There is no amount of letter writing and explaining that can make anybody see the matter in any but our light. As further proof of our claim in this connection, we beg to state that we had to refund to every one of our customers the amountswhich they had paid against our drafts on them in cover of the portion of Rosin "K" bought by each of them. They claim that they bought a certain lot of rosin delivered in Rio harbor, that is, at a price that represents cost, insurance and freight, but not discharge ex-vessel or customs duties, and as we could not turn over to them the rosin that they had bought and paid for, they wanted their money back. Had we taken your stand and requested them to await an eventual settlement of a problematical insurance claim, we would have been sued in the courts, here, and would have lost the case long ago, as noone can expect another party to pay for goods when same are not delivered. And that is the stand that your goodselves are taking.

Yours very truly,

RKR/MMC

p.p. W. Kamen
Director-Gerente

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Claimant-Appellant's Exhibit 13

S. A. Companhia Geral Commercial do Rio de Janeiro

(The General Commercial Company Limited)

Rua 1.° de Março, 96

Caixa Postal N.° 400

Telephone Norte { 2611 / 4071 / 5821

Tel. "ALMINKO"

Codigos: A. B. C. 5.ª, Liebe's West. Union, Ribeiro A. B. C. 5.ª 5 Letras General A-1 Masters Bentley's

ALMINKO

No. 797

General OCT 3 Rio de Janeiro, Sept. 19, 1919

Asiw

E 13

CASA MATRIZ:

A. S. DET ALM. HANDELSKOMPAGNI (THE GENERAL COMMERCIAL COMPANY LTD.)

COPENHAGUE

COMPANHIAS SUBSIDIARIAS:

EUROPA:

LONDON
AMSTERDAM
CHRISTIANIA
STOCKHOLM
BARCELONA
MARSEILLE
PETROGRAD
MOSCOU

AMERICA:

NEW YORK
SÃO FRANCISCO
BAHIA
SANTOS
SÃO PAULO
BUENOS AIRES
VALPARAISO
LA PAZ

ASIA:

YOKOHAMA
OSAKA
VLADIVOSTOCK
OMSK
TSCHITA

General Commercial Co.,
New York City.

Dear Sirs:

ROSIN "K" - shortage of 800 bbls-ex s/v "St. John Newfoundland"-

We beg to confirm receipt of your cable $22118, received today, reading as follows-

"rosin, referring to your letter of August 7th, you are wrong in, we, will not remit"

and in reply thereto we wish to say that we shall not advise you further relative to this matter but shall submit this dispute to Director Andersen upon his arrival at our City.

Yours very truly,

S. A. Companhia Geral Commercial do Rio de Janeiro.

ABz
MMC

Director Gerente

Encl: Cable Confirmation.

Claimant-Appellant's Exhibit 14

THE GENERAL COMMERCIAL COMPANY, LTD.

—OF—

UNITED STATES

295 BROADWAY

NEW YORK June 8, 1921.

CABLE ADDRESS "ALMINKO"

Mr. Alexander Holst,
25 Rue des Remparts,
Bordeaux, France.

My dear Alexander Holst:-

I have just obtained your new address from Freia, and understand that you must just recently have left Tours. As I am afraid that you may soon again flit about to some other place, I am writing you in a hurry to tell you that we are going to need your testimony in a short while in connection with the S/V "St. John" case, which you undoubtedly still remember. This old suit against the Job Shipping Co. is still pending in the courts here, and while we have won in the one court, our opponents are still working very strong to reverse the judgment through the Court of Appeals. They have at times contended that they could prove that we knew about the stowing of these 800 bbls. of Rosin on deck, and that it was our own fault therefore that we did not provide for the proper insurance, in spite of the fact that the B/L bore no notice to the aforesaid effect. While I do not believe for a moment that they should actually be able to prove such a thing, yet I have seen so many peculiar happenings in our courts here of late, that I want to be prepared for the worst. To the best of my knowledge you were the only one who handled this shipment, booking the freight, buying the goods, supervising the invoicing, insurance, etc., and I am equally confident that you have never received any such notice verbally or otherwise, as you would then surely have attended to proper coverage of insurance.

It is your testimony to the above effect that I have told our attorneys to obtain in the proper legal fashion, and I understand there is a great deal of red tape connected with having it done in just the proper official manner, so it may take a while yet before they get all the papers prepared which you will have to answer, and I am writing you now merely to be sure that you will not have left Bordeaux also before we can catch you. I figure this letter should reach you before we send the aforesaid legal papers off from here, and there will thus be time for you to cable me in case you should be leaving Bordeaux in the near future, and unless you expect your address to be the same as above until at least August the 1st, 1921, I would appreciate it very much if you will notify me telegraphically at once upon receipt of this under my private cable address "VICTORHANS NEWYORK". If you expect to be in Bordeaux until August the 1st you need not cable me anything. If you go elsewhere please note where we can reach you.

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Mr.Alexander Holst,BORDEAUX. (2)

I shall probably write you more in the same connection, so as to refresh your memory with the circumstances, but I am hurrying to get this off by the first mail, and will therefore say nothing more on the subject today.

Hoping that you are enjoying yourself in France, and with many kind regards from everybody here, believe me,

Sincerely yours,

VH:MK

P.S. It goes without saying that we do not wish you to incur any expenses on your own account in the above connection, and you must tell us whatever it costs you to cable us,or anything else, and I shall then see to it that you are reimbursed promptly.

At the,execution of a Commission for the examination of the witness Alexander Holst this paper writing was produced and shown to said Alexander Holst and by him deposed unto at the time of the examination before

Commissioner

Claimant-Appellant's Exhibit 15

THE GENERAL COMMERCIAL COMPANY, LTD.

—OF—

UNITED STATES

~~11 FRONT STREET~~

~~205 BROADWAY~~

NEW YORK

CABLE ADDRESS "ALMINKO"

August 2, 1921.

Mr. Alexander Holst,
A/B Marabou Chocolate Factory,
Syndbyberg, Stockholm, Sweden.

My dear Alexander Holst:

I duly received your letter of June 18th and I am glad to note that you still have the S/Y "St. John" shipment clear in mind. Our attorneys have in the meanwhile forwarded on the 26th of July a commission to the United States Consul in Stockholm with attached interrogatories and cross-interrogatories by our opponents which you will shortly be requested to answer before the American Consul in Stockholm, if they have not already gotten in touch with you before this.

I have seen copies of both the interrogatories and cross-interrogatories and the questions which our attorneys are putting to you will undoubtedly be very easy for you to answer but the cross-interrogatories by our opponents are more intricate and obviously aim at tripping you, wherefor I would ask you to be very careful in your answers.

As it is more than three years ago that you handled the shipment there will naturally be a good many points that cannot now be entirely clear in your mind and you have not the papers to refresh your memory there which we have at our disposal here. It is your privilege, however, to merely answer such questions by stating that you do not remember and it will probably be better for you to make this reply than trying to answer such points which might involve you in lengthy thought experiments - in fact you should make your replies as short as possible and wherever the question may be covered by a "yes" or "no" these are the words to use.

The points now at issue are merely as to whether the carriers ever informed us in any way whatsoever before the loss occurred that they had placed this Rosin on deck, and next whether The General Commercial Company, Ltd. of United States and the S/A Companhia Geral Commercial do Rio de Janeiro are two entirely different companies, and particularly on the former point your testimony will be of value.

Our attorneys suggested that it would be the easiest way to pay the American Consul his fees through you and I will, therefore, have Mr. Vilstrup send you a check for $100.00 which I am sure should suffice. Out of this amount I ask you also to remunerate yourself for whatever expenses we may put you to in this connection, and when you are through you can then send us an accounting at your convenience. If the amount should not be enough you need only advise me by cable and we will send you additional funds as needed.

Hoping that you will not mind our putting you to all this trouble and thanking you beforehand for your kind cooperation, I am, with many kind regards,

Sincerely yours,

THE GENERAL COMMERCIAL CO., LTD. OF UNITED STATES.

President.

P.S. I enclose herewith draft on Stockholms Enskilda Bank for £100-0-0

VH:O

At the execution of a Commission for the examination of the witness Alexander Holst this paper writing was produced and shown to said Alexander Holst and by him deposed unto at the time of the examination before

Commissioner

217 *Opinion.*

United States Circuit Court of Appeals for the Second Circuit, October Term, 1921.

No. 218.

Argued February 14, 1922, Decided March 27, 1922.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libellant-Appellee,

v.

SCHOONER "ST. JOHNS, N. F.," HER TACKLE, etc., ST. JOHNS SHIPPING CORPORATION, Claimant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Rogers, Manton, and Mayer, Circuit Judges.

Appeal from the District Court for the Southern District of
218 New York. Libel filed in rem, by S. A. Compania Geral Commercial Do Rio de Janeiro, libellant, against the schooner "St. John's, N. F.," her tackle, etc., St. Johns, N. F. Shipping Corporation, Claimant.

Decree for libellant; claimant appeals. Affirmed.

Haight, Sanford, Smith & Griffin, Esqs., Proctors for Appellant;
Henry M. Hewitt, Esq., Advocate.
Crowell & Rouse, Esqs., Proctors for Appellee;
E. Curtis Rouse, Esq., Advocate.

MANTON, *Circuit Judge:*

This appeal is from a final decree awarding damages for the loss of eight hundred barrels of rosin, shipped from New York, consigned to Rio de Janeiro on the schooner "St. John's, N. F." in June, 1898. An answer was filed, to which exceptions were interposed on the ground that the answer did not state a defense to the cause of action alleged in the libel. The exceptions were sustained, resulting in a decree for the appellee.

On June 6, 1918, Job & Co., as agents for the schooner St. John's N. F., entered into a written freight contract with the General Commercial Company, Ltd., through its agents, to carry on board the schooner St. John's N. F. then at the Port of New York, eight hundred barrels of rosin "on or under deck" to the port of
219 Rio de Janeiro at the agreed freight of Thirty dollars per long ton prepaid. The rosin was loaded on deck, boxed down and planked. A clean bill of lading, dated June 12, 1918, was issued and contained no reference to deck stowage or relieving clauses

therefor, or any clause referring to prior freight engagement. On June 19th, the schooner sailed. She was properly manned and equipped and seaworthy in all respects, but before arrival at her port, the deck cargo broke adrift in a hurricane and it was necessary to jettison the rosin. The invoice of the cargo in New York at the time of shipment was $21,037.02 and general marine insurance of the shipment was procured in the sum of $23,200. Upon failure to receive the cargo, the appellee was unable to collect the insurance by reason of the disclaimor of liability by the insurance company because there was a failure to disclose the stowage of the shipment on deck, which risk was not covered by the policy issued. A recovery has been allowed for the market value, with interest, of the rosin at Rio de Janeiro. The freight contract permitted a stowage on or under deck at the ship's option. The first question presented, is whether the ship was bound by a clean bill of lading, to give under deck stowage and is liable for the loss due to failure to stow under deck. It is conceded that the loss was due to jettisoning the cargo when it broke loose in the storm. All other cargo was under deck and none of it was lost or damaged. The vessel was not
220 stranded or in collision and there was no general average.

The freight contract was made several days before the bill of lading, and does not contract, by its terms, as to details of shipment. It was a reservation for space and gave to the ship the privilege of exercising an option as to what space should be furnished, whether on or under deck. Having issued a bill of lading subsequently, it must be deemed that the bill of lading expresses the decision as to what space would be allowed. The bill of lading, because it is silent as to where the cargo was to be stored, does not vary the freight contract. It is argued, on behalf of the appellant, that the contract of shipment did not merge with the bill of lading and that the freight contract controls. It is claimed that by the terms of the freight contract, the ship's option may be exercised so as to load on or under deck, but when it makes its choice, the shipment and the contract are nevertheless made subject to the terms of the bill of lading. A clean bill of lading has long been held to designate a stowage under deck and the issuance of it is an indication by the ship owner of its election to stow under deck. (The Delaware, 81 U. S. 579; De Vasconcellas v. "Sarnia," decided Dec. 14, 1921.) In the latter case, this court held that unless there is an express written agreement to the contrary—or a custom to the contrary is proven—a clean bill of lading obligates the ship owner to stow the cargo under deck.

The bill of lading cannot be said to be at variance with the
221 contract of affreightment. The latter provided for stowage at the election of the ship owner and having exercised its option by issuing a clean bill of lading, the ship is bound by the terms of the bill of lading, whatever may be the remedies of the ship owners as against other parties. This view has found support in the British courts. (The Royal Exchange Shipping Co. v. Dixon (1886) 12 A. C. 11). When goods are carried on deck contrary to the obligation to carry under deck, they are carried at the risk of the ship owner in case of loss through jettisoning. (The Kirkhill, 99

Fed. 575; New Orleans, 26 Fed. 44.) The bill of lading must be deemed the only contract between the libellant and the ship. (The Caledonia, 157 U. S. 124; Leduc & Co. v. Ward, 16 Aspinall Maritime L. C. 290.)

When the case was here before, it was directed that no mandate issue until further order of the court and the parties were permitted to take further testimony in this court. (272 Fed. 673.) The testimony taken in this court was directed toward the relationship between the shipper and the appellee and the appellee's ownership of the goods and the lack of knowledge of the shipper of actual deck stowage. This testimony reveals that the shipper and the appellee are two separate corporations, neither held stock in the other or shares its profits or losses. The merchandise was shipped, the documents forward and the draft paid by the appellee. The shipment was covered by full marine coverage for under
222 deck stowage and this was vitiated by the deck stowage. The testimony satisfactorily establishes the appellee's claim that it lacked knowledge of notice from the ship owner of the actual place of stowage. It therefore cannot be convincingly asserted that there was an assent to deck stowage. In this respect the case differs from Lawrence v. Minturn (58 U. S. 100). We must therefore consider that the bill of lading is controlling and should be read as an absolute direction and obligation to load under deck. Here the shipper relied upon such stowage for it obtained its insurance against deck risks. In Herr v. Tweedie Trading Co. (181 Fed. 483), the question was presented whether there was a merger of the freight contract with the bill of lading. The decision was based upon the ground that there was no conflict between the bill of lading and the contract, and the principal question decided was a conflict between the written and printed clauses in the bill of lading itself. The court decided that all three clauses were in harmony. Such question is not presented on this appeal and the decision in the Herr case does not support the claim of the appellant that there was a merger here of the contract and the bill of lading. Whether or not the appellee be charged with knowledge of the negotiations between the broker and the ship manager is not important for the reason that the same negotiations resulted in the freight contract and thereafter the ship owner exercised its election by issuing a clean bill of lading.

223 The appellee has been awarded a decree for the market value of rosin at Rio de Janeiro on the day on which the vessel reached her destination. This is proper. The cargo was laden on deck contrary to the requirements of the clean bill of lading issued therefor, and by reason thereof, the bill of lading and all its clauses were wiped out and the ship cannot claim the benefits of any limitations therein contained. (De Vasconcellas v. "Sarnia," supra.) To so stow the cargo was a deviation which changed the character of the voyage so essentially that the ship owner who has deviated cannot claim the benefits of the terms of the bill of lading. It vitiates and avoids the contract of carriage. (Lawrence v. Minturn, 58 U. S. 100; Constable v. Natl. S. S. Co., 154 U. S. 51;

Pacific Coast Co. v. Yukon Co., 155 Fed. 29.) The same rule prevails in England (Royal Exchange Shipping Co. v. Dixon, supra.) The reason therefor is that the exemption clauses and limitation in the bill of lading are for the benefit of the carrier who has control of the shipments after its delivery to him. By his bill of lading he declares the manner and place of carriage. The shipper, having this notice, understands the reasons attendant upon the character of the transportation and accepts the limitations and dangers. Freight rates are fixed accordingly. The shipper protects himself accordingly with insurance. When the carrier voluntarily varies from the method or place of carriage contracted for, he leaves
224 the shipper with unknown risks against which he has not insured and he cannot recover on the insurance which he obtains. The ship owner is in the same position as in the case of deviation in route. (The Globe Navigation Co. v. Russ Lumber Co., 167 Fed. 228.) The limitation of liability being eliminated, the appellant became subject to the general rule of damages which, in the case of non-delivery, is the market value of the goods, less the landing charges at the time and place the shipment should have arrived. (Downing v. Outerbridge, 79 Fed. 931; So. Pac. Ry. Co. v. Reagin, 228 Fed. 14.) Since it is stipulated that the market price of the shipment of rosin at Rio de Janeiro on the day the schooner arrived was Forty thousand nine hundred and eight and 20/100 Dollars, the decree for that amount, with interest, was proper.

Decree affirmed.

225 *Order for Mandate.*

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, of the 3rd Day of April, One Thousand Nine Hundred and Twenty-two.

Present :

Hon. Henry Wade Rogers,
Hon. Martin T. Manton.
Hon. Julius M. Mayer,
Circuit Judges.

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANIERO,
Libellant-Appellee,

v.

SCHOONER ST. JOHNS, N. F., HER TACKLE, etc., ST. JOHNS, N. F.,
Shipping Corporation, Claimant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

226 This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with interest and costs. It is further ordered that a mandate issue to the said District Court in accordance with this decree.

H. W. R.
M. T. M.

Endorsed: United States Circuit Court of Appeals. Second Circuit. S. A. Companhia etc. v. S-hooner St. Johns. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed April 3, 1922. William Parkin, Clerk.

227 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 226 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of S. A. Companhia Geral Commercial Do Rio de Janeiro, against Schooner "St. Johns," as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court t
be hereunto affixed, at the City of New York, in the Southern Distri
of New York, in the Second Circuit, this 2nd day of May in the yea
of our Lord One Thousand Nine Hundred and twenty-two and o
the Independence of the said United States the One Hundred an
forty-sixth.

[Seal of United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN,
Clerk.

228 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable th
Judges of the United States Circuit Court of Appeals for th
Second Circuit, Greeting:

Being informed that there is now pending before you a suit i
which Schooner St. Johns, N. F., her tackle, etc., St. John's, N. F
Shipping Corporation, is appellant, and S. A. Companhia Ger
Commercial Do Rio de Janeiro, is appellee, which suit was remove
into the said Circuit Court of Appeals by virtue of an appeal fro
the District Court of the United States for the Southern District
New York, and we, being willing for certain reasons that the sa
cause and the record and proceedings therein should be certified
the said Circuit Court of Appeals and removed into t
229 Supreme Court of the United States, do hereby command y
that you send without delay to the said Supreme Court,
aforesaid, the record and proceedings in said cause, so that the sa
Supreme Court may act thereon as of right and according to l
ought to be done.

Witness the Honorable William H. Taft, Chief Justice of t
United States, the twelfth day of June, in the year of our Lord o
thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,923. Supreme Court of the United Stat
October Term, 1922. No. 385. St. Johns N. F. Shipping Cor
ration, Owner etc., vs. S. A. Companhia Geral Commercial do Rio
Janeiro. Writ of Certiorari. United States Circuit Court of Appe
Second Circuit. Filed Jun. 16, 1922. William Parkin, Clerk.

230 In the Supreme Court of the United States.

ST. JOHNS, N. F., SHIPPING CORPORATION, Petitioner,

against

S. A. COMPANHIA GERAL COMMERICAL DO RIO DE JANEIRO, Respondent.

It is hereby stipulated and consented that the certified copy of the transcript of record heretofore forwarded by the Clerk of the United States Circuit Court of Appeals for the Second Circuit shall be the return of said Clerk to the writ of certiorari heretofore granted herein.

Dated at New York City, June 7th, 1922.

HAIGHT, SMITH, GRIFFIN & DEMING,
Proctors for Petitioner.
CROWELL & ROUSE,
Proctors for Respondent.

231 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York June 16th, 1922.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

232 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. St. Johns N. F. Shipping Corpn. v. S. A. Companhia Geral Commercial do Rio de Janeiro. Return to Certiorari.

233 [Endorsed:] File No. 28,923. Supreme Court U. S., October Term, 1921. Term No. 385. St. Johns N. F. Shipping Corporation, Owner etc., Petitioner, vs. S. A. Companhia Geral Commercial do Rio de Janeiro. Writ of certiorari and return. Filed June 19, 1922.

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NOTICE OF PETITION FOR WRIT OF CERTIORARI.

Supreme Court of the United States

OCTOBER TERM, 1921.

ST. JOHNS N. F. SHIPPING CORPORATION,
Petitioner,

against

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO,
Respondent.

Sirs:

TAKE NOTICE that the annexed petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause will be presented to the Supreme Court of the United States at the opening of court on the 15th day of May, 1922.

Dated, New York, May 6th, 1922.

Yours, etc.,

CLARENCE BISHOP SMITH,
Proctor for Petitioner.

To

Messrs. CROWELL & ROUSE,
Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

ST. JOHNS N. F. SHIPPING CORPORATION,
Petitioner,

against

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of St. Johns N. F. Shipping Corporation respectfully shows to this Honorable Court:

The proceeding sought to be reviewed was begun by the filing of a libel on May 17, 1919, by S. A. Companhia Geral Commercial do Rio de Janeiro in the United States District Court for the Southern District of New York against the schooner *St. Johns N. F.* Your petitioner filed a claim of owner and an answer to the libel.

On exceptions filed to the answer an interlocutory decree was entered in the District Court.

Although the bill of lading limited damages to the invoice value, damages were assessed for the full market value in the port of delivery, for $40,908.20 with interest, and a final decree was entered for $46,389.97. 7

Thereupon an appeal was taken to the Circuit Court of Appeals for the Second Circuit, where the parties were directed to take additional testimony, and thereafter the District Court decree was affirmed.

The action was brought to recover damages for loss of a deck cargo jettisoned in a storm. The freight contract allowed the carrier to carry on deck, but the libelant claimed that this right was lost because the fact of shipment on deck was not endorsed on the bill of lading. 8

There are two questions involved:

First: Does a carrier lose his contract right to stow cargo on deck because the bill of lading is silent as to where the cargo is stowed?

Second: Under these circumstances, when there was no violation of the contract, is the bill of lading clause limiting the carrier's liability to the invoice cost of the shipment invalidated so that recovery may be had for the market value at the port of destination, which is almost double the amount agreed upon?

9

Summary of Facts.

On June 6, 1918, W. & S. Job & Co., Inc., as agent for the schooner *St. Johns N. F.*, entered into a written freight contract with the General

10 Commercial Co., Ltd., through the latter's broker, Zeller (pp. 69, 115, 136, 155), to carry on board that schooner, then at New York, 800 barrels of rosin *on or under deck*, ship's option, to Rio de Janeiro (Contract, p. 11).

Fox, representing Job & Company, informed Zeller, the shipper's broker, that the rosin could only be carried stowed on deck (p. 138).

Zeller communicated with the shipper and received word that it was all right if the rosin was stowed on deck. It was only after obtaining this authorization that he drew and signed the contract (p. 117).

All the libelant's witnesses who had anything to
11 do with the shipment admit knowledge of the contract giving the ship the right to stow on deck (Hansen, pp. 56, 79; Zeller drew the contract—pp. 64, 72; Holst, p. 51).

The dock permit issued to the shipper on the signing of the contract also gave the information (pp. 139, 151, 201).

A bill of lading in the usual form was issued by the ship's agent in accordance with the freight contract (p. 25).

The rosin was securely loaded on deck and the schooner, in every way seaworthy, sailed on June 19, 1918 (p. 187). During the voyage the deck cargo broke adrift in a hurricane and it was necessary to jettison the rosin for the safety of crew
12 and vessel (Stip., p. 135). Under the perils of the sea clause in the bill of lading the ship was not liable for this loss (p. 26).

The libelant had ordered the rosin from the shipper under an ordinary *c. i. f.* contract. The libelant and shipper acted together as branches of a Danish corporation (pp. 72, 131, 132).

The invoice cost of the rosin was $21,037.02 and general marine insurance of the shipment was procured in the amount of $23,200, but the underwriters refused to pay, owing to the failure of the shipper to disclose the fact that the ship had the option to stow on deck (Stip., p. 20), and the consignee lost the $23,200 insurance (Exs. 11-A, 12, pp. 208-210). The insurance to be taken out under the *c. i. f.* order was limited to cover the invoice cost plus 10 per cent. (Ex. C, p. 194). 13

In the libel filed against the schooner damages in the sum of $23,200, the insured value, was claimed, because of the non-delivery of the rosin. Subsequently libelant, in order to obtain the market value of the rosin at Rio de Janeiro, obtained an order amending Article Eighth of the libel, increasing the damages claimed to $49,500 (p. 17), and was allowed to recover on the basis of market value, not invoice value. 14

The bill of lading was never assigned and so there is no question of the rights of a purchaser of the bill of lading for value, who had no notice of the right to load on deck.

The Circuit Court of Appeals found:

(1) That under the freight contract the shipowner had the right to carry this cargo on deck.

(2) That the shipowner did load it on deck.

(3) That the shipowner issued a bill of lading which made no statement as to where the cargo had been stowed. 15

The Circuit Court of Appeals held that the bill of lading, because it said nothing about the place of stowage, was in conflict with the petitioner's

16 right to stow on deck. We very respectfully submit that in so deciding that Court went contrary to every known authority. It is true that, where there is no freight contract allowing shipment on deck, or no custom allowing shipment on deck, a bill of lading that is silent as to where cargo is stowed, will be construed to signify that the cargo has been stowed under deck—the customary place of stowage will be presumed; but from the days of *Lawrence* v. *Minturn*, 58 U. S., 100, where the shipping contract allowed stowage on deck (see shipping contract, p. 105), and the bill of lading was silent as to where it was stowed (see bill of lading printed p. 106), it has been universally the law
17 that there is no contradiction in such a case, and the bill of lading, which is silent as to the place of stowage, properly covers the cargo stowed on deck.

Similarly, where custom allows stowage on deck, it has always been held that the carrier may or may not, at his option, stow on deck, and a bill of lading without notation of stowage will not signify stowage under deck. If either by custom or contract the carrier may stow on deck, a clean bill of lading does not necessarily mean that the cargo has been stowed under deck. The decision of the Court below is revolutionary.

The petitioner also respectfully represents that the Circuit Court of Appeals went contrary to
18 every well established principle of damages when it failed to limit them to the invoice value of the shipment. The Court reached this conclusion by holding that the carrier elected to carry the cargo under deck. The facts are undisputed and such conclusion of law, reached on the undisputed facts, shocks common sense.

The carrier never elected to carry the cargo under deck. Its fault, if any, was in failing to notify the shipper, after the election had been made and the cargo had been loaded, that the stowage was on deck.

The carrier necessarily decides where it is to load, when it loads. The bill of lading is issued after the cargo has been received on board and the election has been made. Therefore, if the carrier committed any error, it was, as above stated, one of omission in not affirmatively stating how the cargo had been loaded. If it had done so, it is admitted that the libelant could only have recovered the invoice value. There was no deviation which should give damages greater than those actually fixed by the contract. The carrier always had the right to carry on deck, actually loaded on deck, and never thought of doing anything but carry on deck. The carrier's error, if any, was merely one of omission to give notice.

Petitioner presents in further support of this petition a brief with references to the authorities.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in this case, which was entitled in that Court "S. A. Companhia Geral Commercial do Rio de Janeiro, Libelant and Appellee, against Schooner *St. Johns N. F.*, her tackle, etc., St. Johns N. F. Shipping Corporation, Claimant and Appellant,"

22 to the end that said case may be reviewed by this Court as provided by law, and that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem just, and that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court.

ST. JOHNS N. F. SHIPPING CORPORATION,

(Sd.) Clarence Bishop Smith, by JOHN R. FOX,
Counsel for Petitioner. Treas.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

23 JOHN R. FOX, being duly sworn, deposes and says: I am treasurer of the St. Johns N. F. Shipping Corporation, the petitioner herein; I have read the foregoing petition and the same is true as I verily believe.

JOHN R. FOX.

Sworn to before me this
8th day of May, 1922.

LINDSAY D. HOLMES,
Notary Public,
(SEAL) N. Y. Co.

24

I hereby certify that I have read the foregoing petition and in my opinion it is well founded and deserves the favorable consideration of this Court.

CLARENCE BISHOP SMITH,
Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

ST. JOHNS N. F. SHIPPING CORPORATION,
(Claimant below),
Petitioner,

against

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO,
(Libelant below),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Facts.

The facts are sufficiently stated in the petition.

I.

Three classes of cases—deck shipment by consent, deck shipment allowed by custom, deck shipment without consent.

Deck shipment by shipper's written consent. The leading case on deck shipment with shipper's written consent is *Lawrence* v. *Minturn,* 58 U. S., 100. There the facts were similar to those in the case at bar. The deck cargo was lost by jettison, and the shipment was arranged by the shipper for the consignee named in the bill of lading. The con-

signee brought suit. As above stated, the shipping contract provided for shipment on deck (p. 105). The bill of lading (given at length, p. 106) contained no mention as to where the cargo had been loaded. In that case the consignee libeled the ship *Hornet* for the non-delivery of certain boilers and machinery consigned to him and shipped at New York. The consignor of the cargo at New York on July 19, 1851, entered into a freight contract with the agents of the *Hornet* by the terms of which the bulk of the machinery was to be loaded on deck. The cargo was so loaded and bills of lading in the usual form were given, which were silent as to deck stowage of any of the cargo. After sailing and encountering bad weather, the machinery and boilers loaded on deck were jettisoned by the master of the *Hornet*. On failure to deliver the cargo at San Francisco, the consignee libeled the *Hornet*. After hearing all the proofs and pleadings, the District Court for the Northern District of California decreed the libelant a recovery. This Court reversed the decree and dismissed the libel with costs.

Deck shipment permitted by custom. A second well-recognized class of cases relates to trades where, by custom, deck shipment is permitted without special contract. In those cases the usual bill of lading is issued, making no mention of stowage on deck, and the consignee cannot complain if cargo is stowed on deck. If the shipper wishes to find out if the cargo has been stowed on deck he must inquire. A case of this type is *The Del Norte,* 234 Fed., 667.

Boxes containing books, papers and a typewriter were shipped on the steamship *Del Norte,* which

was a lumber carri
and general cargo v carrier engaged in carrying lumber
were stowed on dec cargo up the coast. The boxes, which
ing containing an on deck under the usual bill of lad-
and part of the deg an exception of perils of the sea,
overboard in a sev he deck load of lumber were washed
lost cargo claimed a severe storm. The owner of the
of lading did not aimed that the exception in the bill
there was a general not apply, but it was proved that
riers on the Pacific general custom among the lumber car-
dise as was offered Pacific Coast allowing such merchan-
or on the lumber offered for carriage to be stowed with
The above case ber carried as a deck load.
bar, except that the case is very similar to the case at
from custom instea at the privilege to stow on deck arises
carrier had the opti instead of from special contract. The
to do so. If he did he option to stow on deck if he chose
of the cargo so sto he did exercise this option, the owner
As those who hav so stowed could not complain.
cargoes on deck b who have the option of stowing special
making any notati deck by custom may do so, without
whether they have notation on the bill of lading as to
carrier who has the have or have not done so, so may a
as the option by contract.

Deck shipment o
per's consent. Or *nent of ordinary cargo without ship-*
deck, and therefor . Ordinarily cargo is placed under
receives no permis erefore in such cases, if the carrier
on deck, he must s permission from the shipper to ship
deck shipment to b ust ship under deck. Permission for
evidence rule by be t to be effective must avoid the parol
ten permission has by being in writing. If no such writ-
the absence of spec n has been given, a bill of lading in
cargo has been sto f special custom will signify that the
that it has been st en stowed under deck, unless the fact
bill of lading. The en stowed on deck is endorsed on the
g. The Court below put the case at

bar into this class, and cited as authorities (p. 200) *The Delaware,* 81 U. S., 579, and *DeVasconcellas* v. *Sarnia,* reported 278 Fed., 459. Other cases cited by the Court were on collateral matters.

These cases properly stand for the proposition above stated and belong to the third class, but they clearly recognize the existence of the two other classes of cases above referred to, which are just as well-recognized classes of cases as the third class. We respectfully submit that the Court was in error in holding that the case at bar belonged to the third class.

In *The Delaware,* the shipowner, after loading cargo on deck under a clean bill of lading, sought to prove consent to deck stowage by offering evidence of an oral agreement. The Court, of course, held that parol evidence was inadmissible to vary the terms of the written contract. That the difficulty confronting the shipowner in that case rested entirely on a rule of evidence appears from the following extract from the opinion (p. 605):

> "No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact."

In the case at bar there is no such difficulty. The carrier has the written shipping contract to show that it had permission to load the cargo on deck, the same kind of evidence which was held good in *Lawrence* v. *Minturn* (supra).

In *The Sarnia,* decided by the Circuit Court of Appeals of the Second Circuit, the facts were substantially identical and the evidence introduced by the carrier to prove that the shipper had consented to the cargo being shipped on deck was held to be insufficient. The Court in that case recognized with equal clearness, however, the two classes of cases above referred to, and said (p. 460):

> "Where goods are shipped under a clean bill of lading the obligation is that they are to be put under deck, unless there is an express written agreement to the contrary or a custom to the contrary is proven."

In recognizing these two classes of cases, the Court necessarily admitted that there may be a contract or a custom which will allow the carrier to carry the cargo on deck if it chooses to do so. The custom in such cases does not force the carrier to carry cargo on deck, but gives him the option to do so without any notation on the ordinary bill of lading. The Court also, in *The Sarnia,* makes it perfectly clear that it is not necessary that the bill of lading should state anything about stowage, but may be a perfectly clean bill of lading. Judge Rogers said (p. 460):

> "But as silence in a bill of lading as to stowage is not an express contract to carry under deck the shipowner may prove an agreement to carry on deck where a claim for loss is made."

The following points should be noted and will be numbered and treated in order, as follows:

II. It is no objection that the written consent to loading on deck is given in a document other

than the bill of lading. The two will be construed together.

III. The vital point is whether written consent is given. The cases are clear that if written consent is given the consignee cannot complain if the goods are carried on deck.

IV. There is no complication here as to the possible rights of a bona fide purchaser of the bill of lading without notice.

II.

It is no objection that the consent to deck loading is given in a document other than the bill of lading, namely, the freight contract. The two will be construed together.

On this point it would perhaps be sufficient to cite the last quotation in the previous point, and the case of *Lawrence* v. *Minturn* (supra), where the consent to deck shipment was in the freight contract, but the reasons supporting these decisions are also important.

The freight contract as drawn up by the shipper's broker is the basic agreement. It sets forth the terms of carriage, named the vessel, the freight rate, the nature and the amount of cargo and stipulated that the shipment might be stowed on deck at ship's option. It further stated that it was subject to the conditions of the Act of Congress of February 13, 1893, and to terms of bills of lading in use by the vessel's agents.

It is important to determine the effect, if any, of the bill of lading which was issued in the usual form under date of June 12, 1918, on the pre-existing contract of affreightment.

The nature of a bill of lading is such that it operates both as a receipt and as evidence of the contract of carriage.

> *Michie on Carriers*, p. 331.
> *Van Etten* v. *Newton*, 134 N. Y., 143.

The bill of lading on which libelant relies functioned primarily as a commercial shipping receipt and secondarily as a contract of carriage to the extent that its provisions supplemented the original agreement. There is no sound reason for ignoring the original contract, which permitted stowage on deck.

In the case of *Herr* v. *Tweedie Trading Co.*, 181 Fed., 483, the Circuit Court of Appeals of the Second Circuit construed the conflicting provisions of a freight contract and subsequently issued bill of lading substantially similar to the documents here in question. The freight contract provided that it was subject to bills of lading subsequently issued by the Tweedie Trading Company. The Court construed both instruments together and held that the freight contract controlled the bill of lading even where the provision of the bill of lading was in conflict with the freight contract. The Court relieved the Tweedie Trading Company from the bill of lading issued by it and said:

> "While there was no special written clause on these bills of lading, they were subject between the parties to the indorsement on the freight contract."

It was similarly held in *Ardan S. S. Co., Ltd.* v. *Theband,* 35 Fed., 620, that the charter party was not merged in the bill of lading subsequently issued.

This Court, in *The Northern Pacific R. R. Co.* v. *American Trading Co.,* 195 U. S., 439, held that the prior contract of carriage was not merged in the bill of lading.

In *Donovan* v. *Standard Oil Co.,* 155 N. Y., 112, the letter and bill of lading were read together as the contract of affreightment by the Court of Appeals.

In the present case the original contract of affreightment was not merged in the bill of lading, but continued to exist as the basis of the contract of carriage and the freight contract and the bill of lading must, therefore, be read together.

There is no conflict in the two documents, the bill of lading, construed most unfavorably for the claimant, is silent as to the place of stowage, but the right to stow on deck was given in the freight contract.

III.

Consent to deck stowage the determining factor.

In these cases the vital question is whether the shipper did or did not consent to stowage on deck. On this point the Court said, in *Lawrence* v. *Minturn* (supra), at page 114:

> "So the courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the mas-

> ter or owners of the ship, in case of jettison. The received law, on the point, is expressed by Chancellor Kent, with his usual precision, in 3 Com., 240: 'Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss.'"

As an example of the English cases, the Court (continuing its opinion on p. 114) cites *Gould* v. *Oliver*, 4 Bing. N. C., 134, at 142, and quotes the following extract from the opinion in that case with approval:

> "In the last mentioned case, Tindal, C. J., says: 'Now, where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss, leads to the same conclusion.'"

The same doctrine is laid down in the cases of *The Delaware* and *The Sarnia*, as quoted in the concluding pages of Point I above.

IV.

There is no complication of *bona fide* purchaser of the bill of lading for value without notice.

The transfer of a bill of lading does not preclude inquiry into the transaction in which it originated (*Pollard* v. *Vinton,* 105 U. S., 7, at p. 8), but here there is no question of a bona fide purchaser for value involved; the shipper acted for the consignee in making the shipment and with entire authority to contract for shipment under deck. The situation would be no different from a legal standpoint if the shipper were bringing suit.

The case is identical on this point with *Lawrence* v. *Minturn* (supra).

The contract with the shipper was the ordinary *c. i. f.* agreement. The libelant admits that the shipper had a right to consent to the rosin being stowed on deck (Ex. 12, p. 210). It was, therefore, bound by the shipper's contract giving the vessel the right to stow on deck.

> "As a general rule, the consignor, as the agent to whom the owner entrusts his goods to be delivered to the carrier, must be regarded as having authority to stipulate for the terms of transportation. Having the power to make the delivery, he is to be presumed to have all the power necessary to carry it into effect. In the absence of any knowledge to the contrary, the carrier has the right to assume that the consignor has authority to bind the consignee by entering into a special contract which limits the carrier's common law liability; for authority to ship the goods carries with it authority to accept the bill of lading and enter into a

contract limiting the carrier's liability" (*Michie on Carriers*, p. 992).

See, also:

Donovan v. *Standard Oil Co.*, 155 N. Y., 112, 118.

Lewis v. *N. Y., O. & W. Ry. Co.*, 120 N. Y., 429.

Nelson v. *Hudson River R. R. Co.*, 48 N. Y., 498.

Taylor v. *Fall River Iron Works*, 124 Fed., 826.

Wabash R. R. Co. v. *United States*, 178 Fed., 5.

V.

Damages.

In any event, the liability of the schooner should have been limited to the invoice cost of the cargo as provided by clause 1 of the bill of lading, reading as follows:

> "1.—IT IS ALSO MUTUALLY AGREED that unless a higher value be stated herein the value of the property hereby receipted for does not exceed $100 per package, and that the freight has been adjusted on such valuation, and no oral declaration or agreement shall be evidence of a different provision or of a waiver of this clause. In computing any liability for *negligence* or otherwise, by the shipowner as carrier or otherwise, regarding any property hereby receipted for no value shall be placed on the said property higher than the

> invoice cost not exceeding $100 per package (or such other value as may be expressly stated herein), nor shall the shipowner be held liable for any profits or consequential or special damages, and the shipowner shall have the option of replacing any lost or damaged goods" (p. 30).

It was error to hold that the bill of lading and all its terms were wiped out by the absence of a notation on the bill of lading that the shipment was on deck. The consent to deck stowage was sufficiently evidenced in the bill of lading as issued when that document is read in conjunction with the freight contract that preceded it.

The cases cited in the Commissioner's report afford no analogy between the position of a shipowner who has voluntarily caused his vessel to depart from its prescribed voyage, and the position of a shipowner who has receipted for a deck cargo stowed in accordance with the express terms of a freight contract consenting to deck stowage.

Petitioner contends that under the circumstances of this case, the deck stowage is not analogous to a voluntary deviation, and that the effect of such deviation, namely, the wiping out of the conditions of a bill of lading, is not involved. In deviating, the ship breaches the bill of lading and should and is not allowed to revive it for the purpose of cutting down the damages.

The case of *De Vasconcellos* v. *S. S. Sarnia,* cited by the Court below (supra), disregarded the limitation clause because there had been a breach of the contract in carrying the goods on deck. The very essence of the contract was violated as it was never contemplated by the parties that the stowage would be on deck.

In the present case, there is no breach of contract, the ship had the right to stow on deck. There is at most by the issuance of the clear bill of lading a failure to notify the shipper of the stowage on deck. Such a notification was not contracted for and there is no more reason for implying it than there is in a case where the option is given by custom, where it is held that the carrier need not notify the shipper. But if such notification was necessary, the failure to notify was an act of negligence and comes within the very purpose of the limitation clause regarding negligence.

In *The Hadji,* 18 Fed., 459, decided in the United States District Court for the Southern District of New York, 1883, the clause read:

> "In case of loss, damage or non-delivery, the shipowner shall not be liable for more than the invoice value of the goods."

This limitation was approved by Judge Brown.

In *The Oneida,* 128 Fed., 687, C. C. A., 2nd Cir., the clause read:

> "It is further mutually agreed that in case any loss, detriment, or damage is done to or sustained by any of the goods or property herein receipted for during transportation, * * * in ascertaining the amount of such damage the same shall be computed at the value or cost of said goods or property at the time and place of shipment."

The recovery was limited accordingly. There can be no question that the limitation to invoice value is valid.

The case is of great importance in connection with the law of bills of lading and the decision of

the Circuit Court of Appeals is in conflict with the holding of this Court in *Lawrence* v. *Minturn* and *The Delaware*.

A writ of certiorari should be granted as prayed for in the petition.

CLARENCE BISHOP SMITH,
HENRY M. HEWITT,
Attorneys for Petitioner.

No. ~~988~~ 43

Supreme Court,

OF THE UNITED STATES.

ST. JOHN'S N. F. SHIPPING CORPORATION, Owner of Schooner "ST. JOHN'S, N. F.,"
Claimant-Petitioner,
against
S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO,
Libelant-Appellee.

October Term 1921.

Brief of Respondent in Opposition to Petition for Certiorari.

The petition of the claimant herein should be denied for the reason that—

(1) No questions arising under a Federal or State Statute are involved.

(2) No questions of public interest are involved.

(3) No novel questions of law are involved.

(4) This Court denied, on April 10th, 1922, a petition for *certiorari* in the case of *de Vasconcellas* vs. *The "Sarnia"*, in which the same questions of law and fact were involved, and were

decided the same way. In fact, the present case followed the rules of law announced in *The "Sarnia"* case.

The present petition is based on the claim that the freight space engagement was a contract to carry on deck only, and nowhere else. This is contrary to the fact. An examination of the said space engagement, set forth in full on Page 11 of the Record, shows that it provided for shipment of this rosin as follows:

> "On or under deck, ship's option."
>
> "This contract is made subject to the conditions * * * and terms of bills of lading in use by steamer's agents."

The Circuit Court of Appeals held that this gave an option as to the place of stowing, the exercise of which option was expressed by the subsequent issuance and delivery of a clean bill of lading without endorsement as to loading on deck, and that there was a deviation from this bill of lading which wiped out all its limitations when the shipment was loaded on deck without further notice, and entitled libellant to recover on the basis of the market price at destination at the time the shipment should have arrived.

The amount of damages was stipulated (pages 19-20 of record).

The essential facts of the case are that the space engagement for the 800 barrels of rosin involved in this suit was made on or about June 6th, 1918, and on the same day, dock permits were issued for the shipment by the claimant,

bearing the same notation as to option (See Claimant's Exhibits "2", "A" and "B", Page 201 of the Record), and on June 8th the rosin was delivered to the dock and dock receipts issued therefor without notation (See Claimant's Exhibits "7" and "8", Page 206 of the Record). *Thereafter, or June 12th, the bill of lading, without any endorsement as to deck loading, was issued* (See Pages 25 to 39, inc., of the Record). The ship departed on or about June 19th, 1918, having loaded the entire shipment of libelant on deck.

It is admited that the claimant gave no notice whatever to the libelant or to the shipper of the place of loading. After a few days at sea, the vessel jettisoned the libelant's entire cargo. No other cargo was lost. Upon receipt of the bill of lading, the shipper procured full under deck insurance, which was vitiated by the deck loading.

Title was in libelant by the purchase of the bill of lading and payment of the draft, without notice of deck loading contrary to the bill of lading. It affirmatively appears that neither the shipper nor the libelant in fact knew that the cargo had been put on deck in violation of the bill of lading, until after the loss had occurred.

The suit was instituted by the libelant to recover damages for the loss of the shipment, and damages were claimed in the full amount of the market value at the place and time the shipment should have been delivered. As in *"The Sarnia"* and other cases cited in the opinion, this was held to be the proper measure of damages.

All of the arguments raised and cases cited by the petitioner in its petition and brief on this motion, particularly the arguments based on the cases of *Lawrence* vs. *Minturn* 58 U. S. 100, and *Herr* vs. *Tweedie Trading Co.* 181 Fed. 483, were argued at length before the Circuit Court of Appeals for the Second Circuit, which Court conducted a complete *de novo* trial and, disposed of them in its very clear opinion (See Pages 217 to 224, inc., of the Record).

Admittedly there was no custom to load such cargo on deck. Petitioner's argument that there was a consent to the deck stowage received very careful consideration by the Circuit Court of Appeals, which held, after considering the facts (Page 222):

> "It therefore cannot be convincingly asserted that there was an assent to deck stowage."

And further, after carefully considering the question as to whether the ship was bound, under the circumstances of this case, by the clean bill of lading, and, if so, the effect on the measure of damages, the Circuit Court of Appeals in its decision used this language:

> "The freight contract was made several days before the bill of lading, and does not contract, by its terms, as to details of shipment. It was a reservation for space and gave to the ship the privilege of exercising an option as to what space should be furnished, whether on or under deck. Having issued a bill of lading subsequently, it must be deemed that the bill of lading expresses the decision as to what space would be allow-

ed. The bill of lading, because it is silent as to where the cargo was to be stored, does not vary the freight contract" (fol. 658).

Petitioner is obviously in error in its statements on Page 5 of its petition as to the holdings of the Circuit Court of Appeals.

Whatever may be said about a legal obligation of the ship in this case to give notice of its election as to the place of stowing, such notice was actually given by the issuance and delivery of the clean bill of lading without endorsement. Having given that notice, i. e., its clean bill of lading, or performed an act in the nature of a notice, which was relied upon by the parties to whom it was given, the petitioner is bound by that act and notice, and is now estopped.

Petitioner's entire argument is based upon an attempt to vary the bill of lading by giving effect to alleged oral conversations prior to the written documents (bill of lading and freight engagement). Such conversations were denied. However it is clear that such written documents cannot be varied by parol testimony.

"The Kirkhill" 99 Fed. Rep. 575;
De Vasconcellas vs. *"The Sarnia"* Dec. 14, 1921; (not yet reported).

This being so, the clean bill of lading imports under-deck stowage, and is vitiated by the ondeck stowage.

"The Delaware" 81 U. S. 579.
De Vasconcellas vs. *"The Sarnia"* Dec. 14, 1921; (not yet reported).

It is apparent from the opinion and the record that the questions raised in this case are identical with those raised in the case of *De Vaconcellas* vs. *"The Sarnia"*, above referred to, and that they have been decided in accordance with the decision in that case. This Court had occasion to consider all of these questions on the presentation of the petition for *certiorari* in "The *Sarnia*" case, and there found that there was no ground for review, and so denied the writ prayed for.

No additional reasons appear in the present petition why review should be granted in this case or as to why certiorari should be allowed.

The Petition For Writ of Certiorari Should be Denied.

CROWELL & ROUSE,
Proctors for Libelant-Appellee,

E. CURTIS ROUSE,
Advocate.

SUPREME COURT OF THE UNITED STATES.

ST. JOHNS N. F. SHIPPING CORPORATION, Owner of Schooner "ST. JOHNS, N. F.",
Claimant-Appellant,

against

S. A. COMPANHIA GERAL COMMERICAL DO RIO DE JANEIRO,
Libelant-Appellee.

No. 385.
October Term, 1922.

On Writ of Certiorari.
Motion to Dismiss, Affirm or Advance.

Sirs:

PLEASE TAKE NOTICE that upon the record herein and the annexed brief of argument, a motion will be made at a session of this Court to be held at the Capitol, Washington, D. C., on the 26th day of February, 1923, at the opening of Court or as soon thereafter as counsel may be heard, for an order dismissing the Writ of Ceritorari and appeal or affirming the decree herein of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York, or, in the alternative, for an order advancing this cause upon the

Calendar for early argument, and for such other and further relief as to the Court may seem just.

Dated, New York, February 1, 1923.

Yours, &c.,
E. CURTIS ROUSE,
Counsel for Appellee,
24 Broad Street,
Borough of Manhattan,
City of New York.

To:
CLARENCE B. SMITH, and
HENRY M. HEWITT, Esqs.,
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27 William Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

ST. JOHNS N. F. SHIPPING CORPORATION, ETC., Petitioner, *against* S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO.	No. 385. October Term, 1922. On Writ of Certiorari.

MOTION TO DISMISS, AFFIRM, OR ADVANCE.

Now comes S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO, Libelant-Appellee, and moves this Court, under Sections 4 and 5 of Rule 6 of this Court, to dismiss or affirm herein, or, in the alternative, to advance this cause for early argument.

This cause is in this Court upon the return of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

This motion is made on the ground that it is so clear from the record that no error was committed, and that the decision is in accord with the law as established by the precedents of this Court, and the Courts of this and other maritime countries, that the writ should be dismissed and the decision of the Circuit Court of Appeals should be affirmed without further argument.

The issues concern the liability, if any, of the vessel, and its owner, for the loss by jettison of cargo placed on deck, for which there was issued a clean bill of lading, bearing no relieving endorsements as to place of stowage or reference to prior agreements.

The District Court entered final decree in favor of libelant for the value of the shipment at destination, less landing charges. From this decree the claimant appealed. After the first argument in the Circuit Court of Appeals, a trial *de novo*, upon further proofs to be taken in that Court, was ordered (Record, Pages 30-32). This proof was taken and appears in the record (Pages 33 to 100 inclusive (with certain exhibits immediately following under Fols. Nos. 191-216, inclusive).

After the trial *de novo*, the case was re-argued, and the Circuit Court of Appeals rendered its final decision affirming the decree below (Record, Pages 101-104). It was to review this decision that the petition for certiorari was granted.

The Facts.

The material facts are fully set forth in the opinion of the Circuit Court of Appeals (Record, Pages 101-103). They are not disputed.

Briefly stated, they are: The shipper, a commission merchant and exporting concern in New York, made a C. I. F. sale of 800 barrels of rosin to libelant at Rio de Janeiro (Record, Page 34, and Exhibit, Fol. 200). On June 6th, 1918, through a freight broker, the shipper was given a freight space reservation or agreement for that shipment. That document was very brief and did not

pretend to set forth the terms of the shipment—for these it referred to the bill of lading. It provided the freight rate and that the place of stowage was to be "on or under deck, ship's option * * *, subject," however, "to the terms of the ship's bill of lading" later to be issued. (For this document, see Record, Page 6). The origin of the presence of this clause is testified to by the broker (Record, Page 60). Permits were thereupon issued by the ship. (Record, Exhibit, Fol. 201). The shipment was delivered to the vessel in due course and dock receipts issued therefor (Record, Page 78, Exhibit, Fol. 206).

Subsequently, on June 12th, 1918, the bill of lading for the shipment was issued and delivered to the shippers. This bill of lading was clean, that is to say, it bore no endorsement, rider or clause, stating that this shipment was to be put ondeck, nor was there any reference to the freight space agreement or provisions thereof. (Record, Pages 10, 13-22).

No notice was given by, or on behalf of, the vessel, after the June 6th, 1918, space reservation or after the shipment was delivered to it, or after the bill of lading was issued or before the vessel arrived at destination, that this shipment was laden on deck (Record, Pages 35, 51-55, 60).

The vessel sailed with the shipment ondeck (Record, Page 10). While en route, this shipment was jettisoned, in fair, calm weather, after a storm (Record, Pages 10, 98). Of course, no delivery was made on arrival of the vessel at destination. It then became known, for the first time, that the shipment had been ondeck (Record, Exhibit, Fols. 193 and 197).

Libelant, a Brazil corporation, was the consignee named in the bill of lading (Record, Pages 10, 13). Upon that document, shippers obtained full marine risk insurance on the shipment therein specified (Record, Page 10). The C. I. F. invoice (Record, Page 22) was forwarded, together with the draft for the amount thereof, and the shipping documents were forwarded to destination and presented to the libelant for payment, and were paid by it, prior to the arrival of the vessel (Record, Pages 10, 35, Exhibit 2, Fols. 192, 194). The only notice libelant had of place of loading was the bill of lading. The amount paid by libelant has not been repaid to it. (Record, page 49.)

Claim was thereupon made upon the underwriters on the policies of insurance, but payment was refused on the sole ground that the bill of lading called for underdeck stowage, and was not endorsed for ondeck stowage, and the policies did not cover ondeck risk (Record, Pages 10, 11). The present suit was thereupon instituted against the vessel, at first for the invoice amount, and later, amended, upon receipt of full information, to the value at destination.

Libelant is a Brazilian corporation entirely separate and apart from the shipper. There is no community of interest in stock holdings or profits and losses between the two concerns (Record, Pages 33, 57, 71). They deal with each other as buyer and seller, but not exclusively (Record, Pages 71, 38, 49).

There is no question of charter involved. The vessel was operated as a general ship, and this shipment was one of a great many. No underdeck, or cargo other than this shipment, was lost, jettisoned, or damaged (Record,

Page 90). No question of general average adjustment arises.

The loss was directly due to the stowage ondeck. No custom to load such cargo on deck for such a voyage was asserted or established.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals has held in its decision (Record, Pages 101-104) that—

First: The vessel was bound by the clean bill of lading to give underdeck stowage (Record, Page 102, Fol. 220).

Second: The prior freight agreement was a preliminary space reservation with the option to the ship, later to be exercised, as to place of stowage (Record, Page 102, Fol. 220).

Third: The bill of lading does not vary the space agreement, but is consistent with it, and is the expression of the ship's election as to place of stowage (Record, Page 102, Fol. 221).

Fourth: The bill of lading was the only contract between the parties (Record, Page 103, Fol. 221), and was not to be varied by negotiations or oral statements prior to its issuance (Record, Page 103, Fol. 222).

Fifth: The bill of lading was breached by the loading ondeck, and such stowage was in the nature of a deviation, and, as such, avoids the bill of lading and all its clauses of limitation as to amount of liability (Record, Page 103, Fol. 223).

Sixth: That the measure of damage in such case of deviation is the market value at destination, less landing charges (Record, Page 104, Fol. 224).

The Court did not hold, as was alleged as the basis of the petition for the writ of certiorari (Petition, Page 5), that the ship only had the right to carry on deck.

The facts are undisputed. The correctness of the conclusions of law is therefore the issue before this Court.

ARGUMENT.

POINT I.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CLEAN BILL OF LADING CONTROLLED, AND THAT DECK STOWAGE IN THE FACE OF SUCH DOCUMENT WAS A DEVIATION, FOR THE CONSEQUENCES OF WHICH THE SHIP IS LIABLE.

A clean bill of lading, not incorporating by reference any other contract or agreement, has been held to be the sole, controlling contract between the parties, while previous documents are merely preliminary steps.

The Caledonia, 157 U. S. 124, at 139.

The bill of lading must contain the entire contract in all its terms, not only as to the conditions of transportation, but the quantity and nature of goods and material facts as to the terms, place of stowage, etc., on which they are to be transported.

> "Bills of lading become documents of title, which pass from hand to hand, and should state the truth of the transaction. There should be no misrepresentation of the quantity of goods received,

and no suppression of any material fact as to the terms upon which they are to be transported, and any excepted perils or qualifications of liability should be clearly stated;"

The Kirkhill, 99 Fed. Rep. 575, 580.
Royal Exchange Shipping Co. *vs.* Dixon, (1886) 12 App. Cas. 11;
LeDuc *vs.* Ward, 16 Aspinall Maritime L. C. 290.

A clean bill of lading, that is, one free from endorsement as to unusual place of stowage, such as ondeck, imports the ship's election to stow underdeck.

The Delaware, 14 Wall. 579;
The Kirkhill, (*supra*);
The Sarnia, 278 Fed. Rep. 459 (cert. denied U. S.);
Royal Exchange Shipping Co. *v.* Dixon (*supra*).

The bill of lading is not to be varied by parole or extraneous evidence.

The Delaware, 14 Wall., 579.
Le Duc *vs.* Ward, 16 Aspinall Maritime L. C. 290.

Thus, where a bill of lading is clean, there must be specific consent, in writing, to the actual deck loading, contrary to the terms of that instrument.

The Gran Canaria, 16 Fed. Rep. 868;
Lawrence *vs.* Minturn, 17 How. 100;
Vasconcellos *vs.* S. S. Sarnia (*supra*).

It would seem that mere knowledge of the shipper that a cargo has been or may have been laden on deck in con-

flict with the bill of lading is not enough unless he thereupon specifically consents thereto.

Royal Exchange Shipping Co. *vs.* Dixon (1886), 12 App. Cas. 11;

in which case it appears by the opinion of Lord Blackburn that the goods were shipped on deck, "probably with the knowledge of the shipper," and, in the face of this, it was held by the entire Bench of the House of Lords sitting thereon that the clean bill of lading controlled, and was deviated from by the ondeck stowage and recovery for the full amount was given to the libelant.

The appellant bases its entire argument in its petition, as it has in both of the lower Courts, on its interpretation of the case of *Lawrence* vs. *Minturn*, 17 How. 100, in support of its contention that, by reason of certain alleged oral statements, said to have been made at the time the space agreement was made, it is to be construed, not as an option, but as a specific engagement for, and consent to, deck stowage alone, and that there remained nothing for the ship to do, and that, therefore, the clean bill of lading is to no effect as to the place of stowage.

The argument is untenable. The oral statements are denied. (Record, Pages 64 and 65.) Even if the statements were made, it is a rule of law, now too firmly established to be questioned, that prior oral conversations cannot be used to vary a subsequent written, unambiguous agreement on the same subject.

The Delaware, 14 Wall. 579.

It has never been, and cannot well now be, claimed that either the bill of lading or the space reservation

agreement are ambiguous. The agreement, if it be anything at all, is for an option to the ship, to be exercised by the ship when loading, and this is, in fact, the accepted theory of the petitioner, for it says in its petition (Page 7):—

> "The carrier necessarily decides where it is to load, when it loads. The bill of lading is issued after the cargo has been received on board and the election has been made."

To construe this particular space agreement as an agreement or consent for on-deck shipment alone is to do violence to the language used, and can be supported only by ignoring entirely the words therein used—"* * * or under deck, ship's option." The presence of these words makes it clear that the ship might do one or the other, not both. As the ship or its owner were the only parties who could determine where this cargo was to finally be placed, the further clause in the agreement—

> "This contract is made subject to conditions * * * and to terms of bills of lading * * *"

make it equally clear that the option was to be subsequently exercised by the ship and expressed in the bill of lading, and that the shipper could rely on that.

The place of stowage is a term and condition of shipment. When no mention is made of it on the bill of lading, underdeck stowage is called for. When any unusual stowage, such as on deck, is used, it is the familiar and simple practice to endorse the words—"on deck, shipper's risk," or similar words which give notice.

Whatever may be said of a legal obligation upon the ship in this case to give notice, where a notice or an act

in the nature of a notice has actually been given, the party is bound by that act. Here, the clean bill of lading was later issued, was accepted and relied upon by the shipper as the notice of the place of stowage, i. e. under deck—and properly so in view of the cases above cited. The shipper relied on this and procured marine insurance accordingly, and negotiated the bill of lading to the consignee, who is the libelant here. The libelant relied upon these documents and paid for the cargo. Appellant is, on the authority of the foregoing cases and the general law, bound by its bill of lading and its election and is estopped.

Lawrence vs. *Minturn* is no authority in support of the appellant's position. In that case the suit was brought to recover for the loss of certain chimneys and boilers, jettisoned from on deck while at sea. There are several material points wherein the case is distinguishable from the present case—*First*, there was no option on the ship as to place of loading. The contract provided "The whole to go on deck, except * * *", articles not involved in the suit. In the present case there was an option on the ship to be later exercised. *Second*, the shipper, Minturn, was part owner of the shipment and was the local representative and managing director of the consignee, who was, in that case, the libelant. In the present case it is established by the proof that the shipper had no connection with the consignee, and was not part owner of the goods, but was an independent concern making a C. I. F. sale to it, and that title in the goods passed from the shipper to the consignee, libelant, by purchase. *Third*, in the *Lawrence* case, the shipper had actual notice of the loading and assisted in the placing of

the shipment on deck, while in the present case there is ample proof that the shipper had no notice of the actual loading on deck. The only element relied upon by the appellant as giving such notice was an alleged statement, prior to both the bill of lading and the freight contract, that it might have to go on deck. Such statement, if made, would of course be immaterial in view of the above cited decisions. It is not contended that the appellant notified the shipper, other than through the bill of lading, after the merchandise was received by it. *Fourth*, in the Lawrence case the Court found, as a fact, that the bill of lading also bore an endorsement as to on deck stowage. The Court says, on Page 112,—

> "But in apply these rules to cargo ondeck, some peculiar considerations must be borne in mind. This bill of lading declares that the property is to go ondeck."

In the present case the bill of lading bears no reference to deck stowage or to the prior contract. Admittedly, it was a clean bill of lading. The decision is consistent with the Lawrence case.

As to the bill of lading, the appellant admits that it was in accordance with the space agreement (See Petition, Fol. 11), and so it was. The ship could stow underdeck, if it chose. A clean bill of lading, importing underdeck stowage, was consistent with that agreement. It was inconsistent with ondeck stowage. The liability of the ship is therefore clear.

POINT II.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THE CARRIER LIABLE AS FOR DEVIATION.

A variance by the ship from the terms of its bill of lading, whether it be from the route designated or by over carriage beyond destination or by carrying ondeck under a clean bill of lading, is a deviation, or is equivalent to a deviation, and as such wipes out all the protective clauses of exemption and limitation contained in the instrument.

Calderon *vs.* Atlas S. S. Co., 170 U. S. 272;
Niles vs. Dampk. Balto (C. C. A. 2nd Circ.), 282 Fed. Rep. 235.
Vasconcellas *vs.* S. S. Sarnia, 278 Fed. Rep. 459 (cert. denied, U. S.).
Royal Exchange Shipping Co. *vs.* Dixon, (1886) 12 App. Cas. 11.

POINT III.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE MEASURE OF DAMAGES WAS THE VALUE OF THE SHIPMENT AT THE TIME AND PLACE IT SHOULD HAVE BEEN DELIVERED, LESS LANDING CHARGES.

The measure of damages which may be recovered for a loss sustained through such deviation is the value of the shipment at the time and place it should have arrived, less landing charges.

Mobile Ry. *vs.* Jurey, 111 U. S. 584, 596;
Niles *vs.* Dampk. Balto (*supra*);
Vasconcellos *vs.* S. S. Sarnia, 278 Fed. Rep. 459 (cert. denied U. S.);
Royal Exchange Shipping Co. *vs.* Dixon (*supra*).

The Court was therefore correct in its decision, expressed at the foot of Page 103 of the Record, *et seq.*, that the invoice price did not control, but that the value at the time and place the shipment should have arrived, less landing charges, was the measure of damage.

There was no dispute in this case as to this value. It was stipulated as $40,908.20 (Record, Page 11). The decree was for this amount with interest.

POINT IV.

LIBELANT WAS THE PROPER PARTY TO SUE AND WAS AN INNOCENT OWNER FOR VALUE.

It is presumed that the consignee or endorsee of the bill of lading is the owner of a shipment, and is the proper party to sue for the loss thereof.

Lawrence *vs.* Minturn, 17 How. 100;
Le Duc *vs.* Ward, 16 Aspinall Maritime L. C. 290.

The presumptions in this case are in favor of the libelant who was the consignee named in the bill of lading and the endorsee thereof. These presumptions are strengthened by the proof taken on the trial *de novo*, that it had

purchased the shipment and paid the drafts. It was an independent entity from the shipper, and knew nothing about the shipment except what it saw on the bill of lading and documents, and therefore was the innocent holder for value. If the ship contended otherwise, it had the burden of proving the contrary, and this burden it has not sustained. In fact, there is no evidence to rebut this fact.

POINT V.

THIS MOTION SHOULD BE GRANTED.

Where, in view of the previous decisions of the courts the questions presented are found to be so wanting in substance as not to need further argument, this Court may dismiss or affirm on motion under Sections 4 and 5 of Rule 6.

City of Boston *vs.* Jackson, No. 141 Oct. Term, 1922, decided Dec. 4, 1922;
Chicago & R. I. R. R. *vs.* Devine, 239 U. S. 52.

In the present case, there is no variance in the authorities, and the decision appealed from is in harmony with the law previously announced by the decisions of this Court.

The points raised by appellant are frivolous and it is manifest that the petition and appeal were taken for purposes of delay only. The decision should be affirmed under Section 5 of Rule 6 of this Court.

The decision of the Circuit Court of Appeals, to the effect that the bill of lading controlled, and called for under-deck shipment, and that loading on deck, without further consent, was a deviation which wiped out the limitation and restrictive clauses of the bill of lading, and rendered the vessel liable in damages to the full value at destination, was correct, and this motion should be granted.

LAST POINT.

THE WRIT HEREIN SHOULD BE DISMISSED, OR THE DECISIONS AFFIRMED, OR, IN THE ALTERNATIVE, IF THE COURT DEEM THAT A FULL ARGUMENT IS REQUIRED, THE CASE SHOULD BE ADVANCED ON THE DOCKET FOR HEARING AT AN EARLY DATE.

Respectfully submitted,

E. CURTIS ROUSE,
Counsel for Appellee.

CROWELL & ROUSE,
Proctors.

Supreme Court of the United States

ST. JOHNS N. F. SHIPPING CORPORATION, owner of Schooner *"St. Johns, N. F.,"*
Petitioner
(Claimant below),

against

S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO,
Respondent
(Libelant below).

No. [redacted]43

October Term, 1922.

On Writ of Certiorari.

BRIEF IN OPPOSITION TO MOTION TO DISMISS, AFFIRM OR ADVANCE.

Statement of Facts.

The General Commercial Co., Ltd., entered into a written freight contract with the petitioner to ship on board the schooner *St. Johns* at New York 800 barrels of rosin on or under deck, ship's option, to Rio de Janeiro (Contract, p. 6; Court's Opinion, p. 101). The respondent and the shipper were branches of a Danish corporation (pp. 39, 47, 97). The respondent had ordered the rosin from the shipper under the ordinary c. i. f. contract (p. 50). A bill of lading, naming the respondent as con-

signee, was issued which had no reference to the fact whether the cargo was stowed under deck or on deck. The shipper, without making any inquiry as to whether the cargo had been shipped on deck or under deck, procured insurance based on the invoice value of the goods. The cargo on the voyage was jettisoned because of an excepted sea peril and the insurance company refused to pay the insurance because it did not know that the carrier had the right to ship on deck. The bill of lading limited recovery to the invoice cost (Sec. 1, p. 16). The libelant originally sued for the insurance value based on the invoice cost, but subsequently amended its libel (p. 9) on the theory that because the shipping of the cargo on deck had not been mentioned in the bill of lading, the vessel had been guilty of a deviation and therefore the actual value of the goods at destination could be recovered. This value was nearly twice the invoice value. The District Court allowed the libelant to recover the full value of the goods at the port of delivery and the decree was affirmed by the Circuit Court of Appeals. A writ of certiorari was granted by this court on June 12th, 1922 (p. 106). The case is No. 385 on the calendar of this court and may be expected to be soon reached for argument. The libelant has now moved under Rule 6 to dismiss or affirm or advance this case.

POINT I.

The motion practically amounts to a rehearing of the application for a writ of certiorari and should not be allowed.

This motion is not within the intent of the rules of this court. The points now pressed on motion were passed upon when the court granted the writ of certiorari. Subdivision 4 of Rule 6, under which the motion is made, is expressly limited to writs of error and appeal. Subdivision 5 apparently applies only to writs of error and appeal because it speaks of a motion to affirm on the ground "that it is manifest that the writ or appeal was taken for delay only or that the questions on which the decision of the cause depend are so frivolous as not to need further argument." Now, a writ of error is *"taken,"* while a writ of certiorari is *"granted."* The rule therefore does not apparently refer to writs of certiorari, and properly so, for this matter has once been presented to this court on papers of the same character as those used on this motion, namely, a petition and brief filed by each party.

No new point is raised on these papers which was not argued on the petition for writ of certiorari.

POINT II.

Argument on the merits.

Right by contract to ship on deck not lost, because nothing said about place of shipment in bill of lading. There is nothing inconsistent between the shipping contract, which allowed shipment on

deck, and the bill of lading, which stated nothing as to where the cargo was shipped. The respondent argues that when the bill of lading was issued it completely superseded the shipping contract, but the bill of lading did not so supersede the shipping contract in the Supreme Court decision—*Lawrence* v. *Minturn,* 17 How. 100. In the report of that case, page 105, the shipping contract is given, and on page 106 the bill of lading is given, the latter making no reference to the shipment on deck allowed by the shipping contract.

In the case of *Herr* v. *Tweedie Trading Co.,* 181 Fed. 483, the Circuit Court of Appeals for the Second Circuit construed the conflicting provisions of a freight contract and subsequently issued bill of lading substantially similar to the documents here in question. The freight contract provided that it was subject to bills of lading subsequently issued by the Tweedie Trading Company. The court construed both instruments together and held that the freight contract controlled the bill of lading even where the provision of the bill of lading was in conflict with the freight contract. The court relieved the Tweedie Trading Company from the bill of lading issued by it, and said:

> "While there was no special written clause on these bills of lading, they were subject between the parties to the indorsement on the freight contract."

It was similarly held in *Ardan S. S. Co., Ltd.,* v. *Theband,* 35 Fed. 620, that the charter party was not merged in the bill of lading subsequently issued.

This court, in *The Northern Pacific R. R. Co.* v. *American Trading Co.,* 195 U. S. 439, held that the

prior contract of carriage was not merged in the bill of lading.

In *Donovan* v. *Standard Oil Co.,* 155 N. Y. 112, the letter and bill of lading were read together as the contract of affreightment by the Court of Appeals.

Right by custom to ship on deck not lost, because nothing said about place of shipment in bill of lading. A second well-recognized class of cases relates to trades where, by custom, deck shipment is permitted without special contract. In those cases the usual bill of lading is issued, making no mention of stowage on deck, and the consignee cannot complain if cargo is stowed on deck. If the shipper wishes to find out if the cargo has been stowed on deck he must inquire. A case of this type is *The Del Norte,* 234 Fed. 667.

Boxes containing books, papers and a typewriter were shipped on the steamship *Del Norte,* which was a lumber carrier engaged in carrying lumber and general cargo up the coast. The boxes, which were stowed on deck under the usual bill of lading, contained an exception of perils of the sea, and part of the deck load of lumber was washed overboard in a severe storm. The owner of the lost cargo claimed that the exception in the bill of lading did not apply, but it was proved that there was a general custom in that trade to allow stowage on deck. The court held it made no difference that the cargo owner did not know where the cargo was stowed.

The above case is very similar to the case at bar, except that the privilege to stow on deck arises from custom instead of from special contract. The carrier had the option to stow on deck if he chose to

do so. If he did exercise this option, the owner of the cargo so stowed could not complain.

As those who have the option of stowing special cargoes on deck by custom may do so, without making any notation on the bill of lading as to whether they have or have not done so, so may a carrier who has the option by contract.

The cases cited by respondent rest on the parol evidence rule. Permission for deck shipment to be effective must avoid the parol evidence rule by being in writing. If no such written permission has been given, and nothing about place of shipment has been stated in the bill of lading, the court will imply in most trades a promise that the cargo has been stowed under deck. The court below put the case at bar into this class, and cited as authorities (Opinion, p. 102) *The Delaware,* 81 U. S. 579, and *DeVasconcellas* v. *Sarnia,* reported 278 Fed. 459. Other cases cited by the court were on collateral matters.

In *The Delaware,* the shipowner, after loading cargo on deck under a clean bill of lading, sought to prove consent to deck stowage by offering evidence of an oral agreement. The court, of course, held that parol evidence was inadmissible to vary the terms of the written contract. That the difficulty confronting the shipowner in that case rested entirely on a rule of evidence appears from the following extract from the opinion (p. 605):

> "No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, but the burden to prove such con-

> sent is upon the carrier, and he must take care that he has competent evidence to prove the fact."

In *The Sarnia,* decided by the Circuit Court of Appeals for the Second Circuit, the facts were substantially identical and the evidence introduced by the carrier to prove that the shipper had consented to the cargo being shipped on deck was held to be insufficient. The court in that case recognized with equal clearness, however, the two classes of cases above referred to, and said (p. 460):

> "Where goods are shipped under a clean bill of lading the obligation is that they are to be put under deck, unless there is an express written agreement to the contrary or a custom to the contrary is proven."

In recognizing these two classes of cases, the court necessarily admitted that there may be a contract or a custom which will allow the carrier to carry the cargo on deck if it chooses to do so. The custom in such cases does not force the carrier to carry cargo on deck, but gives him the option to do so without any notation on the ordinary bill of lading. The court also, in *The Sarnia,* makes it perfectly clear that it is not necessary that the bill of lading should state anything about stowage, but may be a perfectly clean bill of lading. So long as the shipper has agreed that the cargo may be stowed either under or on deck, mere silence in the bill of lading as to the place of shipment does not give any ground for an implication that the goods have been stowed in one place rather than the other. Judge Rogers said (p. 460):

> "But as silence in a bill of lading as to stowage is not an express contract to carry

under deck the shipowner may prove an agreement to carry on deck where a claim for loss is made."

POINT III.

There is no complication of *bona fide* purchaser of the bill of lading for value without notice.

The transfer of a bill of lading does not preclude inquiry into the transaction in which it originated (*Pollard* v. *Vinton*, 105 U. S. 7, at p. 8), but here there is no question of a *bona fide* purchaser for value involved; the shipper acted for the consignee in making the shipment and with entire authority to contract for shipment under deck. The situation would be no different from a legal standpoint if the shipper were bringing suit.

The case is identical on this point with *Lawrence* v. *Minturn* (*supra*).

The contract with the shipper was the ordinary c. i. f. agreement. The libelant admits that the shipper had a right to consent to the rosin being stowed on deck (Claimant's Exhibit 12, having p. 210 of original record and printed here just before the Opinion, p. 101). It was, therefore, bound by the shipper's contract giving the vessel the right to stow on deck.

> "As a general rule, the consignor, as the agent to whom the owner entrusts his goods to be delivered to the carrier, must be regarded as having authority to stipulate for the terms of transportation. Having the power to make the delivery, he is to be presumed to have all the power necessary to

carry it into effect. In the absence of any knowledge to the contrary, the carrier has the right to assume that the consignor has authority to bind the consignee by entering into a special contract which limits the carrier's common law liability, for authority to ship the goods carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability" (*Michie on Carriers*, p. 992).

See, also:

Donovan v. *Standard Oil Co.*, 155 N. Y. 112, 118.

Lewis v. *N. Y., O. & W. Ry. Co.*, 210 N. Y. 429.

Nelson v. *Hudson River R. R. Co.*, 48 N. Y. 498

Taylor v. *Fall River Iron Works*, 124 Fed. 826.

Wabash R. R. Co. v. *United States*, 178 Fed. 5.

POINT IV.

Damages.

In any event, the liability of the schooner should have been limited to the invoice cost under clause 1 of the bill of lading (p. 16). Such limitations are valid.

The Hadji, 18 Fed. 459.
The Oneida, 128 Fed. 687.

In this case, the contract allowing the carrier to ship on or under deck was a perfectly proper one

which the parties had a right to make; when the carrier made his election to load on deck and loaded the cargo there, he was also doing a perfectly proper thing and was entitled under his contract to carry the cargo so loaded to its destination. The respondent claims that the carrier should also have made a notation on the bill of lading when issued that the cargo had been stowed on deck. Such a notation was not contracted for, and there is no more reason for implying such an agreement than there is in a case where the option is given by custom, where it is held that the carrier need not notify the shipper. Moreover, even if the respondent's contention were correct, the fault of the carrier would be merely one of clerical omission. There can be no deviation when the vessel was properly loaded under the contract and makes the voyage exactly as the carrier had a right to make it. The cases cited by respondent were cases where the carrier never had the right to carry the cargo on deck. At the most, the carrier's only fault here was to mislead the respondent by the issuance of a document which respondent claims should have stated the place of shipment. If such a statement had been made, the damages would have been limited to the invoice value, and the respondent based its original libel on invoice value. Subsequently it amended the libel so as to claim a deviation, and the courts below have allowed it to recover on this basis almost twice the invoice value.

When the carrier makes a voyage to which the shipper has never agreed, courts hold that he is deviating, doing something to which the shipper did not consent, and, therefore, no exemptions of the contract apply. Here the carrier only did what the parties had agreed it might do from the outset.

The judgment below, therefore, went contrary to every precedent in regard to the measure of damages adopted.

CONCLUSION.

Respondent urges as an alternative prayer that the case be advanced. Petitioner will be ready to argue the case at whatever time the court may fix.

Respectfully submitted,

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Advocate for Petitioner.

[24699]

The Hecla Press, 67 Warren St., N. Y. Tel. Barclay 6280.

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Supreme Court of the United States

ST. JOHNS N. F. SHIPPING CORPORATION, owner of Schooner *St. Johns N. F.*,
Claimant-Petitioner,
against
S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO,
Libelant-Respondent.

October Term, 1922.
No. 385.

BRIEF FOR CLAIMANT-PETITIONER.

Statement.

This cause comes here on a writ of certiorari, on the petition of the St. Johns N. F. Shipping Corporation, to review a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming the decree of the District Court below.

The case was begun in the Southern District of New York, by the filing of a libel by S. A. Companhia Geral Commercial do Rio de Janeiro against the schooner *St. Johns N. F.* to recover damages for loss of some cargo shipped on the schooner to be delivered to it at Rio de Janeiro. Your petitioner filed a claim of owner and an an-

swer to the libel, alleging that the cargo had been jettisoned in a storm to save the ship.

On exceptions filed to the answer, claiming that the defense was not valid because the cargo had been improperly carried on deck, an interlocutory decree was entered in the District Court. Although the bill of lading limited damages to the invoice cost, which was $21,037.02 (p. 10), damages were assessed for $40,908.20, the full market value in the port of delivery, on the theory that the carrier had been guilty of a deviation, and a final decree was entered for $46,389.97.

Thereupon an appeal was taken to the Circuit Court of Appeals for the Second Circuit, where the parties were directed to take additional testimony. Thereafter the District Court decree was affirmed.

After a writ of certiorari had been granted, the cargo owner made a motion under Rule 6 to dismiss or affirm or advance this cause, which motion was denied by this Court on March 5, 1923.

It is undisputed that the freight contract gave the carrier an option to carry on deck, but the libelant claimed that this right was lost because the fact of shipment on deck was not endorsed on the bill of lading.

It cannot be denied that the carrier's only fault, if a fault, was a failure to endorse the deck shipment on the bill of lading.

There are two questions involved:

First: Does a carrier lose his admitted contract right to stow cargo on deck because the bill of lading contains no statement as to where the cargo is stowed?

Second: If it was a fault not to note the admitted right to ship on deck, on the bill of lading, does this fault amount to a deviation, so that the cargo owner can recover more than the invoice value?

Summary of Facts.

On June 6, 1918, W. & S. Job & Co., Inc., as agent for the schooner *St. Johns N. F.,* entered into a written freight contract with the General Commercial Co., Ltd., through the latter's broker, Zeller (pp. 36, 60, 72, 83), to carry on board that schooner, then at New York, 800 barrels of rosin *"on or under deck,* ship's option," to Rio de Janeiro (Contract, p. 6).

A bill of lading in the usual form was issued by the ship's agent (p. 13). It provided in clause 20: "Also, steamer has the right to carry cargo on deck" (p. 19). The cargo owner claims that the bill of lading should also have had a special endorsement that the rosin was carried on deck.

The rosin was securely loaded on deck and the schooner, in every way seaworthy, sailed on June 19, 1918 (p. 99). During the voyage the deck cargo broke adrift in a hurricane and it was necessary to jettison the rosin for the safety of crew and vessel (p. 98). Under the perils of the sea clause in the bill of lading the ship was not liable for this loss (pp. 13, 14).

Bechtinger, who was the managing director of the cargo owner when the transaction took place (p. 96), testified (p. 97) that the shipper and the consignee were "branches of the same organiza-

tion." The parent organization was a Danish corporation known as A/S Detalmindelige Handelskompagni (p. 39), and the libelant's letters in evidence (Exhibits 11-a, 12 and 13, following p. 100, old paging 208-212) have printed on the left side of the sheet the fact that it is the parent company (*Casa Matrix*). These letterheads show that both the shipper and the consignee have the cable address "Alminko," and the consignee refers to the shipper as a "sister company," as follows (Exhibit 12, following p. 100, old paging 211):

> "In order to point out how clear our case is, we would state that if we had bought these 800 barrels from some concern outside of our organization and on arrival of the vessel had found that the goods were short, we certainly would not have accepted the draft as we would then not have paid for something which we had not received. As protection to the seller, we would have returned to him the shipping papers duly endorsed and *HE* would have to fight his case out with the insurance underwriters or the shipowners. It is not just, therefore, that simply because we bought these 800 barrels from a Sister Company, we should stand the loss of the value of same, paid against a sight draft."

The shipper testified that this Danish company owned all of its stock, the certificates having been deposited with the National City Bank (p. 39), and that they call it a sister corporation "Because we act with one another in this big organization which we all belong to." The shipper also testified that they sent copies of their invoices to the Danish company (p. 39).

The consignee requested the shipper to purchase the rosin for it in New York and ship it to Rio de Janeiro (for copy of the order see Exhibit 1, following p. 100, old paging 200). Bechtinger testified as to what the shipper was to get in purchasing the rosin (p. 71), "The shipper is entitled to a straight commission of 2½% on f. o. b. value and nothing else." Hansen for the shipper testified that his company was entitled to charge a profit on the rosin (p. 38), but the invoice which the shipper sent to the consignee (printed at p. 22) refers to the shipper's compensation on the transaction as *commission*.

It is undisputed that the consignee authorized the shipper to arrange for shipment of the cargo on deck, and to cover the cargo with insurance. The shipper so testified (p. 50), and the consignee by its letters (particularly Exhibit 12, following p. 100, old paging 210) shows this clearly to have been the case.

The bill of lading was never assigned and so there is no question of the rights of a purchaser of the bill of lading for value.

The Circuit Court of Appeals found as facts:

(1) That the freight contract contained a clause giving the shipowner the right to carry this cargo on deck.

(2) That the shipowner did load it on deck.

(3) That the shipowner issued a bill of lading which had no special endorsement as to where the cargo had been stowed.

Conclusions of the Court and Points Involved.

The Circuit Court of Appeals held that the bill of lading, because it said nothing about the place of stowage, was in conflict with the petitioner's right to stow on deck. It is respectfully submitted that in so deciding that Court went contrary to every known authority. This matter will be argued in the First Point, after considering a few further facts on the deviation, or damage point. The Court failed to limit damages to the invoice value of the shipment by holding that the carrier *elected* to carry the cargo under deck. The facts are undisputed and such conclusion of law, reached on the undisputed facts, shocks common sense.

The shipping contract (p. 6) shows that the carrier certainly had shipping on deck in mind and Fox, the ship's agent, testified (pp. 72, 73) that he knew when the contract was signed that it must go on deck. This testimony no witness contradicts. Fox also testified, which is unimportant for the present argument, that he told this fact to Zeller, the shipper's broker (p. 73), and Zeller would not swear that this was not so (p. 69). The cargo was loaded on deck, and the carrier necessarily decided where it would load when it loaded. The cargo owner has not produced a single witness to prove that the carrier ever intended to ship under deck. It places its sole reliance on the bill of lading and the carrier's alleged duty to state affirmatively therein where the cargo was carried, the point which will immediately be argued.

In any case the second, or damage point, is clear. If the carrier committed any error, it was

one of omission in not affirmatively stating how the cargo had been loaded. If it had done so, the libelant could not have recovered more than the invoice value. There was no deviation which should give damages greater than those actually fixed by the contract. The carrier always had the right to carry on deck, actually loaded on deck, and never thought of doing anything but carry on deck. The carrier's error, if any, was merely one of omission to give notice.

This huge claim was merely an afterthought on the part of the libelant. In the original libel $23,200 was claimed, being the invoice value plus 10 per cent. for which the cargo had been insured (p. 2). The interlocutory decree was rendered in libelant's favor on December 9, 1919 (p. 7), and it was not until February 13, 1920 (p. 9), that it occurred to the libelant to amend the libel so as to ask for $49,500. Up to that time the shipper had never asked for more than $23,200 (see, for example, Exhibit 4, following p. 100, old paging 204). Similarly it did not occur to the *consignee* to claim more than $23,200 (see, for example, Exhibit 11-a, following p. 100, old paging 208). To allow damages as if there had been a deviation would be to give the cargo owner something which he never expected, something which he would not have received, if the contract had been carried out with the written notice which the cargo owner claims it was entitled to receive.

FIRST POINT.

Silence in this bill of lading did not constitute a promise. Deck and under-deck shipments—three types of cases.

It is undoubtedly true that silence in a bill of lading may *give rise to* a promise to carry cargo under deck, but in every such case this is due to the fact that the surrounding circumstances are such as to make a reasonable man presume that the shipowner will carry the cargo under deck. Silence of itself is not a promise. *It is the surrounding circumstances which speak.* There are three leading classes of cases.

1. *Where shipment under deck is customary and no controlling contract.* Where the shipment is made in a trade where it is customary to carry under deck and there is no valid contract allowing shipment on deck, silence in the bill of lading is reasonably interpreted to mean that the cargo will be carried under deck.

2. *Where shipment on or under deck, at ship's option, is customary and no controlling contract.* Where the shipment is made in a trade where it is customary to carry cargo on or under deck, and there has been no valid contract requiring shipment under deck, silence in the bill of lading cannot be reasonably construed to mean that the cargo will be carried under deck.

3. *Where custom controlled by contract.* Where there is a contract that the goods may be carried

on deck, silence in the bill of lading cannot be reasonably interpreted to mean that the cargo will be carried under deck.

In each of the three classes of cases the principle of interpretation is exactly the same. The one question is, in view of the surrounding circumstances, including the custom of the trade and any valid contract between the parties, does silence in the bill of lading lead to any inference in regard to the carriage of the cargo on deck?

We will now consider the cases. Some of them deal primarily with the question whether the contract to vary the custom can be admitted, if it is not in writing. That, of course, is a question of evidence. Contracts are not admissible to contradict the bill of lading if they violate the parol evidence rule.

SECOND POINT.

Authorities on underdeck and on deck shipment as applied to the three types of case.

The authorities on the three classes of cases considered under the last point, will now be referred to.

1. *Shipment under deck customary, and no controlling contract.* The two cases cited in the opinion of the Court below on this point (p. 102), which were also the main authorities for the decision, were:

The Delaware, 81 U. S. 579.
De Vasconcellas v. *Sarnia*, 278 Fed. 459.

Other cases cited by the Court were on collateral matters.

We submit that both of these cases squarely support the three classifications above set forth. In both, goods were carried in a trade where it was customary to carry under deck and nothing was stated in the bill of lading about the place of shipment. In both, testimony was offered to modify the custom by an oral contract, and the Court refused to admit such evidence on the ground of the parol evidence rule. With such evidence shut out, both Courts construed the bill of lading, which thus constituted the entire contract between the parties, to give a promise to carry under deck. In the absence of a proved contract modifying the custom, the custom spoke when the bill of lading was silent.

Everyone must agree with the decisions and the reasoning, but we call particular attention to the fact that the Court in each case went out of its way to state that the decision would have been otherwise, and the clean bill of lading would have had no such significance, if *by custom or contract* the carrier had been allowed to carry on deck. This is our exact contention—that *the surrounding circumstances speak.*

In *The Delaware,* the Court said (pp. 604-605):

> "Ship-owners in a contract by a bill of lading for the transportation of merchandise take upon themselves the responsibilities of common carriers, and the master, as the agent of such owners, is bound to have the cargo safely secured under deck, unless he is authorized to carry the goods on deck by the usage of the particular trade or by the consent of the shipper, and if he would rely upon the latter he must take care to require

that the consent shall be expressed in a form to be available as evidence under the general rules of law.

Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact."

It is to be noted that the Court expressly refers to the case where the carrier is authorized to carry goods on deck "by the usage of the particular trade or by the consent of the shipper." In such a case the carrier does not have to carry goods on deck, he merely has the option to do so, as here. The Court clearly points out that the only question is whether by custom or a provable contract the carrier has such a right. If he has, the clean bill of lading does not affect his rights. The difficulty in the *Delaware* was the parol evidence rule.

In *The Sarnia* (*supra*), decided by the Circuit Court of Appeals of the Second Circuit, the facts were substantially identical. According to the custom of the trade, cargo was shipped under deck, and the parol evidence introduced by the carrier to prove that the shipper had consented to the cargo

being shipped on deck was held to be insufficient. The Court in that case recognized with equal clearness, however, the two classes of cases above referred to, and said (p. 460):

> "Where goods are shipped under a clean bill of lading the obligation is that they are to be put under deck, unless there is an express written agreement to the contrary or a custom to the contrary is proven."

In recognizing these two classes of cases, the Court necessarily admitted that there may be a contract or a custom which will allow the carrier to carry the cargo on deck if it chooses to do so. The custom in such cases does not force the carrier to carry cargo on deck, but gives him the option to do so without any notation on the ordinary bill of lading. The Court also, in *The Sarnia,* makes it perfectly clear that it is not necessary that the bill of lading should state anything about stowage, but may be a perfectly clean bill of lading. Judge Rodgers said (p. 460):

> "But as silence in a bill of lading as to stowage is not an express contract to carry under deck the shipowner may prove an agreement to carry on deck where a claim for loss is made."

The Sarnia holds that silence in the bill of lading does not constitute a promise to carry under deck. The above language expresses the point exactly. It is not silence, but the surrounding circumstances, which speak. If the carrier has a written option to carry on deck, there is no reason to presume carriage under deck.

2. *Shipment on or under deck at ship's option customary, and no controlling contract.* A second well-recognized class of cases relates to trades where, by custom, deck shipment is permitted without special contract. In these cases the usual bill of lading is issued, making no mention of stowage on deck, and the consignee cannot complain if cargo is stowed on deck. If the shipper wishes to find out if the cargo has been stowed on deck he must inquire. This type of cases dates from the earliest days and is referred to in the summary of the law given in *The Delaware,* in 1871 (*supra*).

An example is *The Del Norte,* 234 Fed. 667.

Boxes containing books, papers and a typewriter were shipped on the steamship *Del Norte,* which was engaged in carrying lumber and general cargo up the coast. The boxes, which were stowed on deck under the usual bill of lading containing an exception of perils of the sea, were washed overboard in a severe storm. The owner of the lost cargo claimed that the exception in the bill of lading did not apply, but it was proved that there was a general custom among the lumber carriers on the Pacific Coast allowing such merchandise as was offered for carriage to be stowed as a deck load.

The above case is very similar to the case at bar, except that the privilege to stow on deck arises from custom instead of from special contract. The carrier had the option to stow on deck if he chose to do so. If he did exercise this option, the owner of the cargo so stowed could not complain.

As those who have the option of stowing special cargoes on deck by custom may do so, without making any notation on the bill of lading as to whether they have or have not done so, so may a carrier who has the option by contract.

That this is a long established type of case appears from *Barber* v. *Brace,* decided in the Supreme Court of Errors of Connecticut, in 1819, 3 Conn., p. 9, and cited with approval by this Court in *The Delaware* (*supra*), 81 U. S., at p. 606. The bill of lading contained no mention of shipment on deck and is quoted (p. 10) as follows:

> "Received, on board the sloop *Mary,* eight hogsheads of gin, of *Horace Barber,* to be transported from *Hartford* to *Boston,* at customary freight; dangers of the seas excepted. *Hartford, November,* 27, 1816.
>
> (Signed) *Nathaniel Hurlbut.*"

The gin was stowed upon the deck of the sloop, and there remained, until, in the course of the voyage, it was thrown overboard by reason of the dangers of the seas. It was not disputed that the jettison was justifiable if the cargo was properly on deck. As in *The Delaware* (*supra*), the defendants tried to excuse themselves through parol evidence, and, as in that case, they failed (p. 14). Parol evidence was not allowed to contradict a clean bill of lading.

The defendant also gave testimony to prove that it was the usage of the trade between Hartford and Boston to transport gin on the vessel's deck (p. 13). The jury found this to be the fact and the Court therefore sustained the verdict and refused a new trial.

The distinction is thus made very plain. If by custom an option is given the carrier to stow cargo on deck if he wishes, there is nothing contradictory in issuing a clean bill of lading. He does not have to state on the bill of lading whether he has or has

not elected to put it there. If the shipper wants to find out where the cargo is loaded, he must inquire. If by custom or contract the carrier has an option to carry the cargo on deck, there is nothing in the surrounding circumstances from which a promise can be implied that the cargo will be carried on deck.

3. *Deck shipment controlled by contract.* There is nothing inconsistent between a bill of lading with no loading endorsement on it, and a written contract allowing shipment on deck. The two documents should be construed together. The leading case is

Laurence v. *Minturn*, 58 U. S. 100.

The facts were similar to those in the case at bar. The deck cargo was lost by jettison, and the shipment was arranged by the shipper for the consignee named in the bill of lading. The shipping contract provided for shipment on deck (p. 105). The bill of lading (given at length, p. 106) contained no mention as to where the cargo had been loaded. The consignee libeled the ship for the non-delivery of the cargo. The District Court for the Northern District of California gave the libelant a recovery. This Court reversed the decree and dismissed the libel with costs.

In construing the written contract of affreightment and the bill of lading, which had no notation as to place of stowage, together, the vital question was whether the shipper consented to have the cargo carried on deck. If he did, there are no surrounding circumstances from which to imply that the bill of lading promised carriage under

deck. On this point the Court said, in *Lawrence* v. *Minturn* (*supra*), at page 114:

> "So the courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the master or owners of the ship, in case of jettison. The received law, on the point, is expressed by Chancellor Kent, with his usual precision, in 3 Com., 240: 'Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss.'"

As an example of the English cases, the Court (continuing its opinion on p. 114) cites *Gould* v. *Oliver*, 4 Bing. N. C. 134, at 142, and quotes the following extract from the opinion with approval:

> "In the last mentioned case, Tindal, C. J., says: 'Now, where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss, leads to the same conclusion.'"

In the cargo owner's previous arguments *Lawrence* v. *Minturn* was criticized because the Court, after quoting the freight contract providing for shipment on deck (p. 105), and after quoting the bill of lading stating nothing as to where the cargo

was shipped (p. 106), said (p. 112): "This bill of lading declares that the property is to go on deck." We know of no manner in which the Court could more forcibly have illustrated the doctrine of the cases above abstracted, notably *The Delaware* and *The Sarnia,* so much relied on by the cargo, that where there is a written contract covering the place of shipment this contract and the silent bill of lading will be construed together. As there was a valid written contract authorizing shipment on deck, the Court treated it as if loading on deck were mentioned in the bill of lading.

The cargo owner further argued that the case of *Lawrence* v. *Minturn* was inapplicable because the shipper had actual notice of the loading, and assisted in placing the cargo on deck. This consent and assistance is, however, merely another type of parol evidence, which will not be allowed to vary the written contract between the parties. In *The Delaware* (*supra*) the Court said, at page 605:

> "Even where it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the Supreme Court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods under deck, but the court admitted that where there is a well-known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner."

The Court cited *Sproat* v. *Donnell,* 26 Me. 187, with approval as sustaining this proposition. Therefore, we submit the shipper's knowledge of shipment on deck is no ground for distinguishing *Lawrence* v. *Minturn.* The Court in *The Delaware* made it perfectly plain that knowledge of the shipper will be disregarded and that the one question is, whether custom or a written consent authorizes stowage on deck.

In view of the decision in *Lawrence* v. *Minturn, The Delaware* and *The Sarnia* (*supra*), the cargo owner found considerable difficulty in arguing that where the freight contract provided for shipment on deck, and the bill of lading said nothing about place of shipment, the two would not be construed together. To distinguish *Lawrence* v. *Minturn,* the cargo owner, therefore, had to make the further point that, if the freight contract contained an *option* to ship on deck, the situation was in some way altered, so that the freight contract and bill of lading should *not* be construed together. It is hard to see on what grounds the distinction is made, and we submit that the distinction entirely ignores the holding of the Court in the cases referred to. For example, we refer particularly to the first paragraph of the citation from *The Delaware,* given on page 10 of this brief, where the Court says that in a trade where cargo is carried customarily under deck the carrier must stow it there "unless he is authorized to carry the goods on deck by the usage of the particular trade, or by the consent of the shipper, and if he would rely upon the latter, he must take care to require that the consent should be expressed in a form to be available as evidence under the general rules of

law." We particularly emphasize in this quotation two words, *"authorized"* and *"consent."* The Court does not for one moment say that the owner must carry under deck unless he can show an agreement that can be put in evidence that the cargo *will be carried on deck.* All that he need show is that he is *"authorized"* to carry on deck, or that the shipper has given his *"consent"* that the goods may go on deck. That there can be no possible doubt about the matter, the Court gives the analogy where the carrier by custom can carry on deck, in which case there is no obligation to carry on deck, but merely an option to carry there if he sees fit. In all of these cases there is nothing inconsistent between the contract *allowing* shipment on deck and the bill of lading containing no statement as to where the cargo is shipped.

This statement of the law in *The Delaware* is again explicitly confirmed by *Lawrence* v. *Minturn,* where the same language is used that the cargo owner cannot complain that the goods are stowed on deck, if it is done *"with his consent,"* and the same word *"consent"* is used in the passage quoted with approval from the English case of *Gould* v. *Oliver. Lawrence* v. *Minturn* also makes the same analogy to the deck shipment cases, where there is only an option to carry on deck and no obligation to state anything whatever as to the place of shipment in the bill of lading.

This strikes at the very root of the case. The opinion of the Circuit Court of Appeals below turns on the following sentence (p. 102):

> "A clean bill of lading has long been held to designate a stowage under deck and the issuance of it is an indication by the ship

owner of its election to stow under deck. (The Delaware, 81 U. S. 579; DeVasconcellas v. 'Sarnia,' decided Dec. 14, 1921.)"

We submit these cases only deal with the parol evidence rule and the construction of the bill of lading in the absence of a provable written agreement. In order that there may be no misconception as to the scope of the decisions, they expressly state that if there was a clean bill of lading and written consent to stow on deck, the carrier can stow on deck. In *Lawrence* v. *Minturn,* the written consent was expressed exactly as it was in the instant case in the freight contract.

4. *No duty on carrier to notify shipper as to stowage.* The cargo owner asks this Court to find that there was an implication in the contract that notice of the place of stowage would be stated in the bill of lading. There is no reason for the implication; notice to the shipper of the deck stowage was not essential to the carriage of the rosin, and, if the shipper required notice as to how the option was to be exercised, it should have so provided in the contract of affreightment.

There is not a particle of evidence in the case, nor is there a single authority cited, to show that when a shipowner has the right either by custom or by contract to ship on or under deck, he has an obligation to furnish information to the shipper as to where he decides to stow it, if the shipper makes no request for such information.

If the bill of lading and freight contract are construed together, according to the authorities cited in this point and the next point, the contract

gives an option to stow on or under deck. It is as if a bill of lading were issued giving that option. In such case the carrier owes no obligation to notify the shipper where the cargo is stowed.

Armour & Co. v. *Walford,* L. R. (1921) 3 K. B. D., p. 473, also 27 Com. Cases 37. In that case the bill of lading contained the clause (p. 478):

> "The Company has the right to carry the goods below deck and/or on deck."

The plaintiff did not inquire from the carrier whether the goods were stowed on deck. The Court said (p. 478):

> "The final point for decision arises on the able argument of Mr. Raeburn that the defendants here owed a contractual duty to the plaintiffs to inform them that the goods were about to be or had been placed on deck and not below deck, so as thereby to enable the plaintiffs to effect an appropriate and valid insurance if they so wished."

The Court held (p. 480):

> "Now in this litigation before me I cannot create the implied obligation suggested by the plaintiffs. Notice to the plaintiffs by the defendants of 'on deck' stowage was not essential to the efficacy of the contract of carriage by sea. * * * There was nothing to prevent them from taking out a policy to cover the contingencies which might arise under that clause 11. The extent of such a policy was a matter for them and not for the defendants. The 'on deck' clause is well known. It has existed on numerous lines for many years. Why should the defendants assume that the plaintiffs had not got an

adequate assurance? The matter lay within the plaintiffs' concern alone. It seems to me also that the plaintiffs had as much opportunity of knowledge as the defendants. In an earlier shipment of part of the total lot of candles the plaintiffs' superintendent had watched its stowage on board the steamship *Abeille*. There was nothing to prevent as agent for them from ascertaining whether the candles in question were placed below deck or on deck of the *Poldiep*."

THIRD POINT.

The bill of lading and the freight contract construed together.

On this point it would perhaps be sufficient to cite the cases referred to in the last point, but the reasons supporting these decisions are also important.

The freight contract as drawn up by the shipper's broker was the basic agreement. It set forth the terms of carriage, named the vessel, the freight rate, the nature and the amount of cargo and stipuated that the shipment might be stowed on deck at ship's option. It further stated that it was subject to the conditions of the Act of Congress of February 13, 1893, and to terms of bills of lading in use by the vessel's agents.

The nature of a bill of lading is such that it operates both as a receipt and as evidence of the contract of carriage.

Michie on Carriers, p. 331.
Van Etten v. *Newton*, 134 N. Y. 143.

The bill of lading on which libelant relies functioned primarily as a commercial shipping receipt and secondarily as a contract of carriage to the extent that its provisions supplemented the original agreement. There is no sound reason for ignoring the original contract, which permitted stowage on deck.

In the case of *Herr* v. *Tweedie Trading Co.*, 181 Fed. 483, the Circuit Court of Appeals of the Second Circuit construed the conflicting provisions of a freight contract and subsequently issued bill of lading substantially similar to the documents here in question. The freight contract provided that it was subject to bills of lading subsequently issued by the Tweedie Trading Company. The Court construed both instruments together and held that the freight contract controlled the bill of lading even where the provision of the bill of lading was in conflict with the freight contract. The Court relieved the Tweedie Trading Company from the bill of lading issued by it and said:

> "While there was no special written clause on these bills of lading, they were subject between the parties to the indorsement on the freight contract."

It was similarly held in *Ardan S. S. Co., Ltd.* v. *Theband,* 35 Fed. 620, that the charter party was not merged in the bill of lading subsequently issued.

This Court, in *The Northern Pacific R. R. Co.* v. *American Trading Co.*, 195 U. S. 439, held that the prior contract of carriage was not merged in the bill of lading.

In *Donovan* v. *Standard Oil Co.*, 155 N. Y. 112, the letter and bill of lading were read together

as the contract of affreightment by the Court of Appeals.

In the present case the original contract of affreightment was not merged in the bill of lading, but continued to exist as the basis of the contract of carriage and the freight contract and the bill of lading must, therefore, be read together.

There is no conflict in the two documents, the bill of lading, construed most unfavorably for the claimant, is silent as to the place of stowage, but the right to stow on deck was given in the freight contract.

FOURTH POINT.

There is no complication of *bona fide* purchaser of the bill of lading for value without notice.

The transfer of a bill of lading does not preclude inquiry into the transaction in which it originated (*Pollard* v. *Vinton*, 105 U. S. 7, at p. 8), but here there is no question of a bona fide purchaser for value involved; the shipper and the consignee were subsidiary companies of a Danish corporation, and the consignee directed the shipper to procure the rosin and ship it. The consignee was named in the original bill of lading and the shipper acted for the consignee in procuring the insurance and had entire authority to contract for shipment under deck (see p. 5, *supra*). The correspondence of the cargo owner shows that it did not know that the shipowner had been given an option to stow on deck and thought the bill of lading might be the only document it had to guide it. It also

shows that it considered the real question to be, whether the shipper ought to have found out that the cargo was carried on deck, in which case the responsibility would be the shippers, not the carriers (Exhibits 11-A and 12, following p. 100, old paging 208-211).

In Exhibit 11-A the cargo owner said:

> "Without further explanation from you it would therefore appear that the responsibility lies between your goodselves and the shipowners."

In Exhibit 12 it said:

> "You sold us 800 barrels of Rosin 'K' at a certain price, which included cost, insurance and freight. Therefore it was distinctly your part of the transaction to see that the goods were properly covered by insurance, and properly shipped in accordance with the terms of the bill of lading. If the bill of lading had a clause to the effect that the goods could be stowed on deck and you did not cover yourselves by insurance on a deck cargo, then you are responsible to us for any loss resulting through such negligence on your part."

The situation would be no different from a legal standpoint if the shipper were bringing suit.

The case is identical on this point with *Lawrence* v. *Minturn* (*supra*).

Even in the case of an ordinary *c. i. f.* agreement, where the relation of the parties is not so close, the consignor is regarded as the agent of the consignee in arranging for the carriage of the goods.

> "As a general rule, the consignor, as the agent to whom the owner entrusts his goods

to be delivered to the carrier, must be regarded as having authority to stipulate for the terms of transportation. Having the power to make the delivery, he is to be presumed to have all the power necessary to carry it into effect. In the absence of any knowledge to the contrary, the carrier has the right to assume that the consignor has authority to bind the consignee by entering into a special contract which limits the carrier's common law liability; for authority to ship the goods carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability" (*Michie on Carriers*, p. 992).

See, also:

Donovan v. *Standard Oil Co.*, 155 N. Y. 112, 118.

Lewis v. *N. Y., O. & W. Ry. Co.*, 210 N. Y. 429.

Nelson v. *Hudson River R. R. Co.*, 48 N. Y. 498.

Taylor v. *Fall River Iron Works*, 124 Fed. 826.

Wabash R. R. Co. v. *United States*, 178 Fed. 5.

FIFTH POINT.

Damages and alleged deviation.

In any event, the liability of the schooner should have been limited to the invoice cost of the cargo as provided by clause 1 of the bill of lading, reading as follows:

"1.—IT IS ALSO MUTUALLY AGREED that unless a higher value be stated herein the value

of the property hereby receipted for does not exceed $100 per package, and that the freight has been adjusted on such valuation, and no oral declaration or agreement shall be evidence of a different provision or of a waiver of this clause. In computing any liability for negligence or otherwise, by the shipowner as carrier or otherwise, regarding any property hereby receipted for no value shall be placed on the said property higher than the invoice cost not exceeding $100 per package (or such other value as may be expressly stated herein), nor shall the shipowner be held liable for any profits or consequential or special damages, and the shipowner shall have the option of replacing any lost or damaged goods" (p. 16).

It was error to hold that the bill of lading and all its terms were wiped out by the absence of a notation on the bill of lading that the shipment was on deck. The consent to deck stowage was sufficiently evidenced in the bill of lading as issued when that document is read in conjunction with the freight contract that preceded it.

Under the circumstances of this case, the deck stowage is not analogous to a voluntary deviation, and the effect of such deviation, namely, the wiping out of the conditions of a bill of lading, is not involved. In deviating, the ship breaches the entire contract and should and is not allowed to revive it for the purpose of cutting down the damages.

The case of *De Vasconcellos* v. *S. S. Sarnia,* cited by the Court below (*supra*), disregarded the limitation clause because there had been a breach of the contract in carrying the goods on deck. The very essence of the contract was there violated, as it was

never contemplated by the parties that the stowage would be on deck.

On the subject of deviation, the Circuit Court of Appeals treated the case at bar as if the facts were analogous to those in *The Sarnia,* where the shipper never consented to deck stowage. The opinion in the instant case disregards the admitted facts. Judge Manton said (pp. 103-104):

> "To so stow the cargo was a deviation which changed the character of the voyage so essentially that the ship owner who has deviated cannot claim the benefits of the terms of the bill of lading. It vitiates and avoids the contract of carriage (Lawrence v. Minturn, 58 U. S. 100; Constable v. Natl. S. S. Co., 154 U. S. 51; Pacific Coast Co. v. Yukon Co., 155 Fed. 29). The same rule prevails in England (Royal Exchange Shipping Co. v. Dixon, *supra*). The reason therefor is that the exemption clauses and limitation in the bill of lading are for the benefit of the carrier who has control of the shipments after its delivery to him. By his bill of lading he declares the manner and place of carriage. The shipper, having this notice, understands the reasons attendant upon the character of the transportation and accepts the limitations and dangers. Freight rates are fixed accordingly."

The Court then points out that when the carrier *deviates* he subjects the cargo to unknown risks to which the shipper has not agreed, and therefore the clauses of limitation in the bill of lading become void.

Such reasoning does not apply here and this is not properly a deviation case. Here the shipper, to use the language of the Court below, did un-

derstand "the reasons attendant upon the character of the transportation and accepts the limitations and dangers." He consented to stowage on deck. Freight rates were "fixed accordingly." Fox, for the ship, testified that the freight was lower on that account (p. 73). Zeller, who acted for the shipper, was not sure about this, but said that the rates were usually lower when the option to ship on deck was given (p. 70). Certainly the freights were fixed with the full knowledge of both parties that the cargo was subject to shipment on deck. When both parties have thus agreed to the voyage in question and paid freight on that basis, assuming the risks of that voyage, the whole reasoning for the deviation decision fails. It would be entirely unfair and contrary to all decisions to allow the shipper to recover more damages than he would be entitled to under the contract, if the contract had been exactly carried out as he claims it should have been, with an endorsement of rosin stowed on deck.

In the present case, there is no breach of contract, the ship had the right to stow on deck. There is at most by the issuance of this bill of lading a failure to notify the shipper of the stowage on deck. Such a notification was not contracted for and there is no more reason for implying it than there is in a case where the option is given by custom, where it is held that the carrier need not notify the shipper. But if such notification was necessary, the failure to notify was an act of negligence and comes within the very purpose of the limitation clause regarding negligence. How this claim for increased damages was an afterthought has been covered in the early part of the brief (p. 7).

In *The Hadji*, 18 Fed. 459, decided in the United States District Court for the Southern District of New York, 1883, the clause read:

> "In case of loss, damage or non-delivery, the shipowner shall not be liable for more than the invoice value of the goods."

This limitation was approved by Judge Brown.

In *The Oneida*, 128 Fed. 687, C. C. A., 2nd Cir., the clause read:

> "It is further mutually agreed that in case any loss, detriment, or damage is done to or sustained by any of the goods or property herein receipted for during transportation, * * * in ascertaining the amount of such damage the same shall be computed at the value or cost of said goods or property at the time and place of shipment."

The recovery was limited accordingly. There can be no question that the limitation to invoice value is valid.

CONCLUSION.

The decrees of the Courts below should be reversed and the cause remanded to the District Court of the United States for the Southern District of New York with instructions to enter a decree in favor of the claimant dismissing the libel, with the costs of this Court and of the Courts below.

Respectfully submitted,

CLARENCE BISHOP SMITH,
HENRY M. HEWITT,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

ST. JOHN'S N. F., SHIPPING CORPORATION, Owner of Schooner "ST. JOHN'S, N. F.",
Claimant-Petitioner,

against

S. A. COMPANHIA GERAL COMMERCIAL do RIO DE JANEIRO,
Libelant-Respondent.

No. 385:
October Term, 1922.

On Certiorari.

BRIEF ON BEHALF OF LIBELANT-RESPONDENT.

This cause is before this Court upon the return of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision affirming the final decree in Admiralty of the District Court for the Southern District of New York in favor of libelant-respondent.

The issues concern the liability of the vessel for the loss by jettison of a cargo of rosin in barrels stowed on deck, for which there was issued a clean bill of lading bearing no relieving endorsements as to place of stowage or reference to any extraneous agreement or document such as a prior freight memorandum. The lower

courts have held this vessel bound by its clean bill of lading and liable herein for a breach in the nature of a deviation, and have fixed the measure of damages at the market value of this cargo at destination, less unpaid landing charges.

Court Proceedings.

The libel is *in rem*. Petitioner appeared and claimed the vessel. The libelant was the owner of the rosin and is the owner of the claim. It was the consignee named in the bill of lading (Record, Page 13, Fol. 26). It is a Brazilian corporation with its principal office in Rio. The shipper was a New York corporation, independent and distinct from libelant.

The theory of the libel was that the vessel had received the goods and issued a clean bill of lading therefor; that it was bound thereby to give underdeck stowage; that by loading ondeck it breached its undertaking and became an insurer and became liable, as for a deviation, for any loss or damage to the shipment to the full amount of loss sustained by libelant; that by reason of the failure to deliver any of the shipment at destination, it became liable to pay libelant's loss, which was market price at destination. The first figures given counsel were incorrect and the libel was thereupon amended, as to amount, by order of Court (Record, Page 9, Fol. 17) before final decree, as soon as the exact amount of the loss was ascertained.

The claimant filed an answer in the nature of a confession and avoidance (Record, Pages 3-6), admitting the material facts, except as to amount, and alleging as a defense that the shipment was properly stowed on-deck and was jettisoned at sea. This defense was based on alleged parol and extraneous evidence outside the bill of lading, and space memorandum.

Exceptions to the legal sufficiency of this answer were filed (Record, Page 7), argued and sustained in the District Court (Record, Page 7, Fol. 13). A reference to special commissioner on the amount of damages was had.

The amount of damages was stipulated, as were also certain facts (Record, Page 10), and the commissioner found in accordance therewith (Record, Page 11). This report was confirmed and a final decree in libelant's favor, and against the vessel and claimant, for such amount with interest and costs, totalling $46,389.97, was duly entered (Record, Page 24).

Upon appeal by the ship owner, the Circuit Court of Appeals for the Second Circuit held that certain questions of fact were, or might be, involved and ordered further proof taken before it (Record, Page 31, opinion reported 272 Fed. 673). This proof was taken and submitted (Record, Pages 33 to 100, inc.) and the case reargued.

In a carefully considered opinion (Record, pages 101-104, reported 280 Fed. 553), the Circuit Court of Appeals made certain findings of fact and conclusions of law, and upheld the District Court and affirmed the final decree (Record, Page 105). The decision was unanimous.

The claimant then petitioned for a writ of *certiorari* to review this record and decision. The petition was granted (Record, Page 106) bringing the case on for its present argument.

Statement as to the Facts.

The material facts are simple and founded on the contemporaneous documents.

Petitioner claims that among the facts must be considered the parole evidence of conversations had between the ship's agent, Fox, and the freight broker, Zeller, prior to and resulting in the memorandum of afreightment. This testimony was offered in the Circuit Court of Appeals over the objection of the libelant, duly taken at the outset as follows (Record, Page 72):

> "Mr. Rouse: All testimony in relation to the dealings with Mr. Zeller prior to the making of this contract are objected to by the appellee * * *. It will be understood that my objection, without repeating it, will be carried as to all of this testimony. * * *. Without waiving my objections I will proceed with the cross-examination."

It presents the only disputed testimony in the case. The testimony thus offered consists of an uncorroborated statement by Fox that he told Zeller this shipment would have to go on deck, as there would not be room for it under deck, and that the flat rate of freight was then fixed (Record, Page 73, top). Zeller denies such statement and gives as his recollection of the conversations that there was an uncertainty as to where the shipment

would be loaded, and that Fox wanted the right to stow it either on the deck or under the deck, and that this was the true origin of the option clause in the freight engagement (Record, Page 60, Fol. 114).

Whatever may have been said between those men, it clearly resulted in the written memorandum of affreightment containing the option reading "(on or under deck, ship's option.)", the whole "contract made subject to the conditions" of the bill of lading later to be issued. Fox testified that he examined this clause, discussed it with Zeller and finally accepted it as being in accordance with his final arrangement (Record, Pages 73 and 83). See, particularly, Record, Page 85, Fol. 160, where he says—

"Q. Well, you signed it with that on? A. Because it did not materially change the tenor of our agreement * * *."

And again, Record, Page 78, Fol. 148:—

"Q. You accepted this freight contract with the 'on or under deck, ship's option' clause? A. I did."

He then issued his permits, bearing the same option (Exhibits 2A and B, Record, Page 100, Fol. 201; Page 78).

There were no further dealings between the ship and the shipper or the broker, either orally or in writing, except through the dock receipts (Exhibits 7 and 8, Fol. 206) and the bill of lading (Pages 13, *et seq.*). The remainder of the facts in the case are found in the documents.

As petitioner has concentrated its statement of facts upon this parol evidence and certain other extraneous

elements, a brief restatement of the entire case may be excused because of its necessity to show the relation of the controlling facts and the lack of materiality and also inadmissibility of the parol evidence offered by petitioner.

The Schooner "St. John's, N.F." was a general ship loaded at New York by her own agents with general cargo for Rio de Janeiro, Brazil. Thus there are no charter party or general average questions involved.

The shipper, a New York corporation engaged in business as a commission merchant and exporting concern, in May, 1918, made a C. I. F. sale of 800 barrels of rosin to libelant at Rio de Janeiro (Record, Exhibit, Fol. 200). On June 6th, 1918, shipper's freight broker, Zeller, procured a memorandum freight reservation or agreement for that shipment signed by Fox, representing the ship. That document is set forth in full on Page 6 of the Record, and is very brief, and does not pretend to set forth the terms of the shipment or transportation—for these it refers to the bill of lading. It is provided as follows:—

June 6, 1918.

"Engaged for account of the General Commercial Co. Ltd. of U. S.
Freight from New York to Rio de Janeiro.
* * * * * * *
800 Barrels Rosin.
(On or Under Deck Ship's Option.)
At $30.00 net, per 2,240 lbs. prepaid.
* * * * * * *
This contract is made subject * * * to terms of Bills of Lading in use by Steamer's Agents."

The clause "on or under deck ship's option" gives rise to the issues in this case and its origin has been referred to above. It was a typewritten insertion.

Shipper later sent the barrels to the dock. *They were loaded and tallied on board* (Record, Page 81, Fol. 153), and receipts given therefor on June 11th (Record, Ex. 7, Page 100, Fol. 206). These were clean and bore no endorsement of place of stowage.

Subsequently, on June 12th or a day or two later, the ship's agents prepared and delivered to shipper the bill of lading covering this shipment, upon prepayment by the shipper of the amount of freight. This is the bill of lading upon which this suit turns. It was signed by Fox, on or after its date (Record, pages 73, 84, Fols. 139, 158). *The bill of lading is clean, that is, it has no endorsement or clause as to stowage on deck.* It has no relieving endorsements for such stowage. It makes no reference to the prior freight engagement (Record, Pages 13-23; Page 10, Fol. 20), or any other document. Libelant is the consignee named therein.

Shipper did not know of the stowage ondeck until libelant cabled as to the loss, after vessel's arrival.

Petitioner states on Page 5 of its brief that "it is undisputed that the consignee authorized the shipper" to arrange for shipment ondeck. There is no testimony to this effect, and the record does not sustain the statement.

Upon receiving the bill of lading, full war risk and marine insurance for all risks of underdeck stowage was procured (Record, Page 10, Fol. 20; Page 45, Fol. 83; Page 53, Fol. 100; Page 44, Fol. 80). Coverage could have been procured for ondeck stowage if the bill of lading had been clausued to that effect (Record, Page 44,

Fol. 81), but not otherwise, as that would have been in conflict with the documents.

Solely because the cargo was stowed on deck under the clean bill of lading, the insurance was vitiated, and libelant could not collect upon it when the loss occurred (Stipulation, Record, Page 11, Fol. 20).

Shipper endorsed the bill of lading, forwarded the documents and draft to the libelant at Rio. Libelant paid the draft for the full invoice, and procured the documents prior to the arrival of the vessel (Record, Stipulation, Page 10, Fol. 20; Pages 34-35, Fols. 63-65; Page 97, Fol. 184; Ex. B, Page 100, Fol. 192 bottom). The amount of the loss or of the draft has never been repaid to libelant by anyone (Record, Page 35, Fol. 64; Page 49, Fol. 92).

The amount of the invoice and the market price at destination were stipulated by the parties (Record, Page 11).

The only notice libelant had of place of stowage was the clean bill of lading.

The vessel sailed from New York on or about June 19th, 1918, and arrived at Rio in due course on August 26th, 1918, and failed to deliver this cargo, reporting there that it had been loaded ondeck and jettisoned at sea to relieve the ship (Stipulation, Record, Page 10, Fol. 20; Page 98, Fol. 186). The vessel had other cargo ondeck, such as structural steel, which was not lost.

No underdeck cargo was lost or damaged. Apparently no other ondeck cargo was lost or damaged. The loss of libelant's cargo was solely due to its being

placed ondeck (Record, Page 5, Fol. 9; Page 98).

The rate on the vessel was originally $45 per ton, and some cargo was booked at that price, both on deck and under, but at the time this cargo was booked the rate had dropped, by order of the Shipping Board, to the maximum of $30 per ton (Record, Page 75, Fol. 142; Page 73, Fol. 139), which was the rate charged this shipper. No alternative rate was provided in the event that ondeck stowage, instead of underdeck stowage, was used (See Contract, Record, Page 6), although the risks were admittedly different, and there was a custom to fix a different rate.

The rate charged was $30 per ton, which was admittedly the same rate charged for underdeck cargo booked on this ship at the same time by this same shipper and by others (Record, Page 93).

The shipper was a New York corporation, whose stock was owned by a corporation in Denmark. It neither owned any stock of or interest in the libelant, nor shared in its profits in any way (Record, Page 33, Fol. 62). Libelant was a Brazilian corporation owning no stock of or interest in the shipper; who owned the libelant's stock does not appear. Their relations were particularly friendly but neither was made the exclusive agent of the other (Record, Pages 33, 36, 38, 57). They were not branches of each other. They were separate and independent organizations as to each other (Record, Page 57) with no community of interest whatever. In this case, as well as others, they dealt with each other as buyer and seller.

The loss was directly due to the stowage ondeck. No custom to load such cargo ondeck for such a voyage was asserted or established.

THE DECISION APPEALED FROM.

On this state of facts the Court held—

(1) That the oral arrangements prior to the contract of June 6th, 1918 (See Record, Page 6), were unimportant because they resulted in that document (Record, Page 103, Fol. 222), saying—

"Whether or not the appellee be charged with knowledge of the negotiations between the broker and the ship manager is not important for the reason that the same negotiations resulted in the freight contract and thereafter the ship owner exercised its election by issuing a clean bill of lading."

(2) That the freight engagement did not, by its terms, contract as to the details of shipment, but merely gave the ship an option as to place of carriage (Page 102). It was preliminary merely.

(3) That the bill of lading did not vary the space agreement, but was consistent with it, and was the expression of the ship's election as to option of place of stowage.

(4) That the vessel expressed its election to stow underdeck through the clean bill of lading, and was bound by that document; saying (Pages 102, 103)—

"Having issued a bill of lading subsequently, it must be deemed that the bill of lading expresses the decision as to what space would be allowed. The bill of lading, because it is silent as to where the cargo was to be stored, does not vary the freight contract.

* * * * * * *

A clean bill of lading has long been held to designate a stowage underdeck and the issuance of it is an indication by the ship owner of its election to stow underdeck. * * *

The bill of lading cannot be said to be at variance with the contract of affreightment. The latter provided for stowage at the election of the ship owner and having exercised its option by issuing a clean bill of lading, the ship is bound by the terms of the bill of lading, whatever may be the remedies of the ship owners as against other parties. * * *

We must therefore consider that the bill of lading is controlling and should be read as an absolute direction and obligation to load underdeck. Here the shipper relied upon such stowage for it obtained its insurance against deck risks."

(5) That the bill of lading was breached by the loading ondeck, and such stowage was in the nature of a deviation, and, as such, avoids the bill of lading and all its clauses of limitation as to amount of liability, (Record, Pages 103 and 104).

(6) That the measure of damages in this case was correctly fixed by the decree at the market value at destination, less unpaid landing charges; saying (pages 103, 104)—

"The cargo was laden on deck contrary to the requirements of the clean bill of lading issued therefor, and by reason thereof, the bill of lading and all its clauses were wiped out and the ship cannot claim the benefits of any limitations therein contained. (De Vasconcellas *v.* 'Sarnia', supra.) To so stow the cargo was a deviation which changed the character of the voyage so essentially that the ship owner who has deviated cannot claim the benefits of the terms of the bill of lading. It vitiates and avoids the contract of carriage.

* * * * * * *

The limitation of liability being eliminated, the appellant became subject to the general rule of damages which, in the case of non-delivery, is the market value of the goods, less the landing charges at the time and place the shipment should have arrived."

The correctness of these conclusions of law are the issues presented to this Court upon this record.

Summary of Respondent's Argument.

Respondent here argues, as it has in the lower Courts, that the bill of lading was the controlling contract and calls for underdeck stowage. The failure to give this stowage was a breach rendering the vessel liable to full damages. That, while the ship, by the preliminary memorandum, may have had the option of stowing on or underdeck, the further clause in that memorandum made the whole transaction ultimately subject to the terms of the bill of lading subsequently to be issued, and that that instrument was thus nominated as the one by which the vessel was to convey to the shipper information of its election as to which of the two options had been exercised; on delivery to the ship the cargo passed from the control of the shipper and into that of the ship owner, who alone exercises the option; that a clean bill of lading, issued by the carrier after loading, designated, as one of its terms, underdeck stowage; and *that here, by the issuance of such clean bill of lading, the vessel exercised its election and gave notice thereby to the shipper of this fact;* that this bill of lading cannot be varied by prior memoranda or oral agreements or other parol evidence; that under these facts, shipper could rely on the documents and there was no duty to inquire further; as the shipper had relied upon it, the petitioner was estopped from varying or explaining it; by the loading on deck, in the face of this bill of lading, without further notice and without endorsement on the bill of

lading, *the ship committed a breach in the nature of a deviation, which deprived it of the benefit of any limitation or relieving clauses in the bill of lading,* such as those relating to sea perils, agreed valuations, or limit of amount, and left it liable to the damages sustained by the cargo owner, which damages were to be computed at the market price at destination, less unpaid landing charges; and that the lower Courts were right in entering decrees in favor of the cargo owner accordingly.

Summary of Petitioner's Argument.

We understand the petitioner's argument to be, on the contrary, that by reason of alleged parol statements prior to the preliminary memorandum, that instrument is to be read not as an option, but as an absolute direction and assent to deck loading alone, and is to be now considered to vary the bill of lading accordingly, or be read together with it to that effect and that the clean bill of lading subsequently issued is a nullity, as far as designating a place of stowage; that as the cargo was lost by jettison due to sea peril, the ship is not liable; or, if liable, then only as for negligence in not endorsing the bill of lading, and to the limited amount provided by clause I of that instrument.

It is not contended that there was any custom for deck stowage of rosin from New York to Rio on such schooners.

POINT I.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CLEAN BILL OF LADING CONTROLLED, AND THAT UNDERDECK STOWAGE IN THE FACE OF SUCH DOCUMENT WAS A DEVIATION, FOR THE CONSEQUENCES OF WHICH THE SHIP IS LIABLE.

A.

THE BILL OF LADING ALONE WAS THE CONTROLLING CONTRACT OF SHIPMENT.

The rosin was not shipped under a charterparty. The "St. John's" was a general ship carrying all sorts of merchandise, and this was only one of many consignments placed on board. A clean bill of lading was issued for it as set forth in the record (pages 13 to 22). This did not refer to any prior freighting agreement or to the place of stowage. Prior to the shipment, freight brokers had procured a written memorandum fixing freight rate, etc., which document was very brief and scanty and appears in the record (page 6). Petitioner relies on this memorandum and seeks to ignore the bill of lading.

This Court, in considering the relation of such agreements to bills of lading subsequently issued and under which cargo actually moved, has held that such documents are merely preliminary steps and are not to be considered as the controlling contract, but that the rights

and obligations of the parties are fixed by the bill of lading, and that that document is the final contract.

"We agree with the Circuit Court that the bill of lading can alone be considered as the contract between the parties, the memorandum being preliminary merely;"

The Caledonia, 157 U. S. 124, 139.

That case involves the consideration of a very detailed and complete contract for shipment of livestock which provides that the loss or damage, if any, to the shipment for any reason, was to be at the risk of the shipper. The bill of lading subsequently issued contained no such clause. The Court held that, although the memorandum was in great detail, it was not to be considered the contract of shipment, but merely a preliminary agreement to carry, and that, the clause of the prior contract not being carried into the clean bill of lading, the rights of the parties were fixed by the bill of lading and not by the prior contract clause.

This has been followed in "The Queensmore", 51 Fed. 250; affirmed 53 Fed. 1022. See also LeDuc *vs.* Ward (1886 Ct. App.) 6 Asp. M. L. C., N. S. 290, and The Kirkhill, 99 Fed. 575, in accord.

The memorandum here is much briefer and less complete than the one in either of the above cases. It has therefore much less claim to consideration as the contract.

Petitioner admits that the bill of lading was signed and issued by the proper representatives of the ship, and was to cover this particular cargo, and that it was issued after the cargo had been loaded. As the vessel

actually received and lifted the shipment, it would make no difference whether the bill of lading was issued before or after loading, as the bill of lading controls even though issued prior to the actual final stowage.

"* * * but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument."

The Delaware, 81 U. S. 579, 600.

There is no question of charter party involved in this case, and yet petitioner cites certain cases such as Ardan S. S. Co. *vs.* Theband, 35 Fed. 620, and others mentioned on p. 23 of its brief, in support of its argument that the bill of lading is a receipt only, and does not merge with, nor supercede the contract, and that the contract controls, and not the bill of lading. These cases are not in point, for they deal with charter parties. The principle is different, for a charter is intended by all parties to be the entire contract in all respects, and the bill

of lading is only intended to be the receipt, or tangible instrument, making it possible for the charterer to deal with the goods while it is in transit. Charters contain the clause that bills of lading not in conflict with the provisions of the charter may be signed, and thus deprive the ship, or master, of authority to issue a bill of lading with a term not covered by the charter or inconsistent with it. (See The Chadwicke, 29 Fed. 521.) In such a case, of course, the bill of lading is a receipt only, and not the contract of transportation. (See Crenshawe *vs.* Pearce, 37 Fed. 432.)

The case of Ardan S. S. Co. *vs.* Theband (*supra*) turns solely on the point that the master expressly had no authority to sign the particular bill of lading used.

But as pointed out by this Court in The Caledonia (*supra*), a brief memorandum of space or affreightment, such as used here, cannot be considered as a contract or as a charter.

There is no question of authority in this case, nor of issuing the bill of lading by mistake. The bill of lading was duly issued by those in authority, and with the intention of covering this shipment, which had been duly received, under the terms of the space engagement. This is admitted by petitioner's agent.

Thus the two elements which distinguish the case of Crenshawe *vs.* Pearce (D. C., S. D., N. Y.), 37 Fed. 432, are not present, but that decision is interesting in that it holds the issuance of bills of lading to be notice of the exercise of an option previously given to the vessel, and that, if this option so exercised be later changed, further notice by the vessel to the shipper would be re-

quired to protect against claims by him for breach or damages, and that notice, once given by the ship (as by a bill of lading) may be relied upon by the shipper. There is no duty upon him to inquire.

The case of Herr *vs.* Tweedie Trading Co., 181 Fed. Rep. 483, is relied upon by the petitioner (brief, page 23) as authority in support of the argument that there is no merger and that both contract and bill of lading must be read together. As we read that case, it turns on the ground that there was no conflict between the bill of lading and the contract but that the main question was a conflict between written and printed clauses, and that all the Court decides is that all three clauses could be and were in harmony. This seems to be consistent with the later views of that Court as expressed in Vanderbilt *vs.* Ocean Steamship Co., 215 Fed. Rep. 886, and with the Court's own definition of its decision stated in the opinion herein.

Such questions do not arise in the present case, for it is admitted that the bill of lading bears no reference to the freight space memorandum.

B.

The clean bill of lading called for underdeck stowage.

A clean bill of lading is one which contains nothing in the margin qualifying its terms, such as naming an unusual place of stowage, as on deck.

Restitution S. S. Co. *vs.* Pirie, 6 Asp. M. L. C. 428.

The place of stowage is just as much a term and condition of shipment and of the bill of lading as is seaworthiness, right to ports of call, non-liability for theft, leakage, etc., or any other of its clauses.

The Delaware, 81 U. S. 579;
South Atlantic S. S. Line *vs.* London Co., 255 Fed. 306.

When any unusual stowage, such as ondeck, is used, it is the familiar and simple practice to indorse the words—"ondeck," "shipper's risk," or similar words which give notice, and make it one of the terms of the bill of lading.

So a bill of lading without a clause as to place of stowage has uniformly been held to be a clean bill of lading and to call for underdeck stowage just as much as though it had such clause endorsed thereon, unless there be a general custom or specific consent to the contrary.

Where the bill of lading is clean, deck stowage without liability for breach of such bill of lading is allowable only under two conditions. First—Where there is a custom to load on deck only, so universal that it is controlling on the trade and the shipper for that particular merchandise and voyage (The Del Norte, 234 Fed 667).—A custom which is not claimed to exist in this case, and which it was not attempted to prove. Second—Where there is a specific written consent to the actual loading ondeck for that trip, evidenced by the acceptance of an endorsement on the bill of lading itself, or in a contemporaneous or subsequent document. It would seem that

mere knowledge of the shipper that a cargo has been or may have been laden on deck in conflict with the bill of lading is not enough unless he thereupon specifically consents thereto, in writing, and in form to be admissible in evidence. (See petitioner's brief, page 17, 18, in accord.) It cannot be by a document prior to the bill of lading.

"As a clean bill of lading imports a carriage underdeck, * * * a stowage in any place less safe would work a fraud upon the purchaser or insurer unless the consent to such stowage is expressed in a form to be available as evidence *under the general rules of law, and the proper way is to note it upon the bill of lading itself;* for, when issued and passing into other hands, *its terms cannot be qualified by any provisions in the charter party which, though the original contract, is therefore res inter alios.*" (Italics ours.)

The Kirkhill, 99 Fed. 575, 578.

See also

The Delaware, 81 U. S. 579, 605;
The Gran Canaria, 16 Fed. 868;
The Sarnia, 278 Fed. 459 (cert. denied, 258 U. S. 625).
Royal Exchange Sh. Co. *vs.* Dixon (1886), 12 App. Cas. 11.

See The Delaware, 81 U. S. 579, which was a suit against the vessel for failure to deliver a cargo of iron for which a clean bill of lading had been issued, but which had, in fact, been loaded on deck and jettisoned at sea. The ship attempted to set up a prior oral agreement for deck loading. This was denied and the vessel held liable. The Court said (pages 602, 604):

"* * * it is settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed

underdeck, and that it is the duty of the master to see that the cargo is so stowed * * *.

* * * Unless the bill of lading contains a special stipulation to that effect the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed underdeck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability, in case of loss, by virtue of the exception, of dangers of the seas, unless the dangers were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment."

A clean bill of lading, not incorporating by reference any other contract or agreement, has been held to be the sole, controlling contract between the parties, while previous documents are merely preliminary steps.

The Caledonia, 157 U. S. 124.

The only cases where an extraneous contract is considered to construe the terms of a bill of lading are those of charters containing the clause that bills of lading "in conformity with", or "not in conflict with" the charter might be signed. But the reason for this is that by agreement of the parties the charter contains the entire contract and details of the shipment and terms and conditions of the transaction. This is not true of incomplete contracts of affreightment or space reservations, such as the one petitioner relies upon here,

"Bills of lading become documents of title which pass from hand to hand, and should state the truth of the transaction. There should be no misrepresentation of the quantity of goods received, and no suppression of any material fact as to the terms upon which they are to be transported, and any excepted perils or qualifications of liability should be clearly stated;"

The Kirkhill, 99 Fed. 575, 581.

and parol agreements, or extraneous documents except charters, are never admitted to vary the bill of lading.

"Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract."

The Delaware, 81 U. S. 579, 604.

See also

Royal Exchange Shipping Co. *vs.* Dixon (1886) 12 App. Cas. 11;
Le Duc *vs.* Ward, 6 Asp. M. L. C., N. S. 290.

A master sailing with the cargo called for by bills of lading issued in his name must be held to have accepted those bills of lading and their terms. So here, the vessel is estopped by having accepted the clean bill of lading and sailed with the goods stowed in open conflict with it.

The Esrom, 272 Fed. 266;
The Caledonia, 43 Fed. 681; aff'd. 157 U. S. 124.

In "The Kirkhill", (C. C. A. 4th Circ.), 99 Fed. 575, there was a prior charter party which provided that bills of lading were to be signed as and when presented without a prejudice to the charter party, and, further, that the charterer was to have the whole of the ship for loading, including * * * alleyways, peaks, etc. Cotton cargo was tendered to the ship to load in the alleyways, and the captain refused unless permitted to en-

dorse "ondeck" or "in alleyways" on the bills of lading. Charterer refused to accept such bills of lading, and, therefore, did not load, and now sues for damages for breach. It was held that the master was justified and the dismissal of the libel was affirmed. The contention of the shipper was that the charter was the complete contract of affreightment, and, therefore, when it provided for transportation in the alleyways and for the signing of a bill of lading, the ship could not require an endorsed bill of lading, as this would be a variance and in conflict with the contract of affreightment. The Court, however, held that there was nothing in such contract requiring the ship to carry all cargo under the one form of bill of lading, or permitting it to carry ondeck cargo under a clean bill of lading.

The Sarnia (C. C. A. 2nd Circ.), 278 Fed. 459 (cert. denied, sub nomen Sarnia S. S. Corp. *vs.* Vasconcellos, 258 U. S. 625), was a case similar to the present upon its facts, the sole difference being that in that case there was a prior oral, not written, contract of affreightment. The cargo was loaded on deck and a clean bill of lading issued and loss or damage sustained by the shipper. The vessel attempted to set up the prior agreement to load on deck. The Circuit Court of Appeals rejected this contention, and held that the clean bill of lading controlled, and called for underdeck stowage, and that the vessel was liable, as for a deviation, to damages to the full amount of the loss sustained, the Court saying (page 462):

"Now, it must be admitted, in the first place, that if a shipowner issues a bill of lading which calls for a shipment under deck,

and then carries the goods above deck, he commits a gross violation of his contract. He thereby not only renders void the shipper's marine insurance, but he exposes the goods to a much greater peril of the sea. It has been established law for hundreds of years that a plain bill of lading imports a shipment under deck. * * * And it is equally well established that, where property is insured under a general description such as cargo, goods, etc., it only covers such property as is stowed under deck, unless it is specified that it is to cover deck cargo, or there is a general usage to carry that particular kind of property above deck. * * * To carry above deck what was insured to be carried below deck vitiates the insurance. * * *

If carrying above deck goods which should have been carried below deck vitiates the policy of insurance, as between the insurer and insured, we see no reason why, for like reasons as between the carrier and the shipper, a like breach of the contract of carriage should not vitiate the valuation clause; * * *

"If a shipowner carries the cargo on deck, he breaks the contract contained in the bill of lading, and so cannot be protected by the exception of jettison."

The British authorities more closely resemble the situation presented by the facts in the present case, and they are uniformly in accord with the American law hereinbefore referred to.

Thus in LeDuc *vs.* Ward, 6 Asp. M. L. C., N. S. 290, there was a shipment under a bill of lading providing for the usual routes, but the vessel went outside of the usual routes to make another port, and was lost by a sea peril. The shipper knew of the proposed trip. The libelant was the endorsee of the bill of lading. The claimant's sole answer was that the shipper knew of the proposed deviation and that, as a deviation for intermediate ports was allowed by the bill of lading, and the loss was through a peril of the sea, the shipowner was to be exonerated. The Court held the vessel liable on the ground that the bill of lading is the only contract

between the ship and the endorsee and that the shipper's knowledge cannot be shown, saying:

"Even where there is a charter party, although the bill of lading is only a receipt as between the charterer and the shipowner, it is more than a receipt as between the endorsee and the shipowner; it contains the contract between them.

Royal Exchange Shipping Co. *vs.* Dixon (1886), 12 App. Cas. 11. Here four bills of lading for various shipments on the same vessel were under consideration in a suit by consignee or endorsee thereof. Three of them bore the endorsement "under deck", while the fourth bore no endorsement at all. The cotton was loaded on deck with the knowledge of the shipper and damaged, and the Court, in holding the vessel liable as for deviation because of deck stowage under the contract providing for underdeck stowage, said of the fourth bill of lading, which was clean, that "it appears to me that there is no difference between" these bills of lading, and sustained this clean bill of lading as one calling for underdeck stowage just as much as the others.

Armour & Co. *vs.* Walford (1921), L. R. 3 K. B. D. 473, is referred to by petitioner on Page 21 of its brief as being a very recent British authority relieving the vessel in the case of an option given to loan on or under deck. The case is distinguishable in that the prior written freight agreement was silent as to place of stowage. It did not contain an option. It was brief, and like the one now before this Court, by a special clause, referred to, and made the shipment subject to, the terms of bill of lading by a provision very similar to the one in the present contract. The bill of lading was issued and deliv-

ered. One of its regular printed clauses was the one quoted by petitioner, namely, that the ship had the right to carry the goods "below deck, and/or on deck." Thus the option was in the bill of lading and not the engagement, and thus the bill of lading was not a clean one as here. It was held by that Court, that since the contract expressly made the shipment subject to the terms of the bill of lading, the bill of lading controlled, and the option to stow ondeck was a term of the bill of lading, and since this shipper had for a long time previous used this form of bill of lading and actually frequently loaded similar cargo on deck in exercise of the option, it should have protected accordingly as it usually did.

In the present case the bill of lading did not have a term containing such option, either printed or endorsed.

The case is flat authority in support of respondent's contention that the bill of lading, and not the prior contract, controlled. The place of stowage is a term of any bill of lading. If there is an endorsement, then the contract is expressed; if there is no endorsement, the bill of lading is clean and calls for underdeck stowage as one of its implied terms. In the present bill of lading there was no reservation of option and there was no endorsement as to place of stowage.

The decision of this Court in Lawrence *vs.* Minturn, 58 U. S. 100, is relied upon by the petitioner as controlling in the present suit. We respectfully submit that the distinguishing features of that case are such that it is not in point on the question of liability of the vessel under the bill of lading and facts of this case. It is,

however, authority for the proposition that the libelant, being consignee of the shipment, is the proper party to sue. The stress placed upon this case by the petitioner is considerably weakened by the fact that the prior contract relied upon was *for ondeck stowage exclusively* as to the cargo lost, the chimneys. There was no option. Also the shipper was obliged to, and did, do the loading. This Court specifically found that the bill of lading also provided that the shipment was to go ondeck. This explains the decision of the Court. The suit was by the consignee for the loss of the boiler chimneys which were laden ondeck at New York by the shipper, who, with the consignee, was one of the owners thereof. These chimneys were jettisoned by the vessel in a storm, and suit was brought to recover their value. There are thus several material points of difference between the cases, such as—

First, there was no option with the ship as to place of loading. The contract provided "The whole to go ondeck, except * * *", articles not involved in the suit. In the present case there was an option on the ship to be later exercised.

Second, the shipper, Minturn, was part owner of the shipment and was the local representative and managing director of the consignee, who was, in that case, the libelant. In the present case it is established by the proof that the shipper had no connection with the consignee, and was not part owner of the goods, but was an independent concern making a C. I. F. sale to it, and that

title in the goods passed from the shipper to the consignee, libelant, by purchase.

Third, in the Lawrence case, the shipper had actual notice of the loading and assisted in the placing of the shipment on deck, while in the present case there is ample proof that the shipper had no notice of the actual loading ondeck. The only element relied upon by the appellant as giving such notice was an alleged statement, prior to both the bill of lading and the freight contract, and the loading, that it might have to go ondeck. Such statement, if made, would of course be immaterial in view of the above cited decisions, and inadmissible as an attempt to vary an unambiguous written document by parol. It is not contended that the appellant notified the shipper, other than through the bill of lading, after the merchandise was received by it.

Fourth, in the Lawrence case the Court found, as a fact, that the bill of lading also bore an endorsement as to ondeck stowage. The Court says, on Page 112,—

> "But in applying these rules to cargo ondeck, some peculiar considerations must be borne in mind.
> This bill of lading declares that the property is to go ondeck."

In the present case the bill of lading bears no reference to deck stowage or to the prior contract. Admittedly, it was a clean bill of lading.

In the present case, even if the memorandum and the bill of lading were read together there would be no inconsistency with the respondent's present argument. The space agreement gave the ship the option where to stow,

the bill of lading followed. Its terms provided for and required underdeck stowage. This character of stowage was consistent with the space agreement. Had they stowed ondeck, and endorsed the bill of lading according, it would likewise have been consistent with the memorandum. But to stow ondeck, and to issue an underdeck bill of lading made a conflict with the bill of lading. This was the breach by the ship.

No specific assent to the actual deck stowage contrary to this particular bill of lading has been shown—or attempted to be shown.

Libelant relied upon the bill of lading as it had a right to do, and procured insurance in accordance with its terms. By petitioner's act in stowing ondeck, it vitiated libelant's insurance. It is not only estopped from going behind its act, but it comes very closely to being guilty of the fraud referred to in "The Kirkhill", 99 Fed. Rep. 575, where it is said at Page 579:

"If such damage (jettison of deckload under clean bill of lading) occurred, the holder of an unqualified bill of lading could, in all fairness, hold the ship responsible for emitting a misleading document of title."

And in Higgins *vs.* Anglo-A. S. S. Co., 248 Fed. 386, 389, where the Court said,

"To give the carrier the benefit of this exception would be to enable it to protect itself against its own fraud."

See also

N. Y. Millinery Co. *vs.* Hamburg, etc., 171 Fed. 577.

C.

PETITIONER HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF OF SHOWING ASSENT TO THE ONDECK STOWAGE IN THE FACE OF THIS BILL OF LADING.

Respondent relies on the clean bill of lading issued by petitioner after the loading and after any prior agreements. This documnet conclusively imports underdeck stowage. This places upon petitioner the burden of proving that the contrary stowage ondeck was proper.

The element of custom does not enter into this case.

In addition to all other considerations, there is a presumption that under clean bill of lading underdeck stowage has been given. It is for the vessel owner, endeavoring to relieve himself from this, to rebut this presumption. If he does not, the ship is liable for full damages sustained.

The Waldo, 28 Fed. Cases, 17056;
The Kirkhill, 99 Fed. Rep. 575.

To meet this burden of proving assent petitioner relies solely upon the option clause of the prior memorandum (Record, page 6) and certain verbal statements alleged to have been made prior to that document. In this it utterly fails.

It is noticeable that the memorandum is dated June 6, 1918, while the bill of lading was dated June 12, 1918 (Record, page 22) and was issued a day or two later (Record, page 84).

To have a prior expression of the assent there should at least be required a very definite direction and agreement to the loading ondeck only *and nowhere else,* as there was in the case of Lawrence *vs.* Minturn, 17 How., 100, although even that case turned on other elements. Certainly no case has been found in the books where an option, previously given was held to be enough.

It is doubtful whether assent given before loading would be controlling in the face of a clean bill of lading later issued ("The Sarnia", 278 Fed. 459) particularly as that is the controlling contract ("The Caledonia", *supra*), and cannot be varied by parol or extraneous evidence ("The Delaware", *supra*) and the introduction of any such prior assent would be an attempt to vary the bill of lading contract by such extraneous or parol evidence and therefore improper ("The Kirkhill", *supra*). To have a valid assent, one must have the knowledge of such stowage in fact—which libellant did not have.

Petitioner's argument, as a whole, is that the bill of lading and affreightment memorandum must be read together and construed as an absolute contract and assent to ondeck stowage alone as in Lawrence *vs.* Minturn (*supra*). To so construe it is to do violence to the language used, and ignores the fact that under the memorandum, as under the bill of lading, the ship would have been within its rights to stow underdeck. Such construction can be supported only by ignoring entirely the words therein used—"* * * or underdeck, ship's option". The presence of these words makes it clear that the ship might do one or the other. As the ship or its owner had complete custody and control of

the shipment and were the only parties who could determine where this cargo was to be finally placed, the further clause in the agreement,

"This contract is made subject to conditions * * * and to terms of bills of lading * * *"

make it equally clear that the option was to be subsequently exercised and expressed by the ship in the bill of lading, and that the shipper could rely on that. There was no necessity for shipper to inquire further. See Armour & Co. *vs.* Walford, L. R. (1921) L. R. 3 K. B. D. 473 in accord. If the ship stowed underdeck, the bill of lading and insurance would be good. Why assume, as petitioner does at Page 24 of its brief, that only ondeck stowage was permitted and that the bill of lading was a nullity?

The testimony as to oral agreements prior to the memorandum, and upon which petitioner seeks to rely for this construction, is wholly inadmissible. It is not claimed that the freight memorandum or bill of lading are ambiguous.

A written contract, not so ambiguous as to be otherwise unintelligible or unenforcible, cannot be varied or modified by parol evidence of negotiations preceding its execution. This rule of law is now too firmly established to require extended citation of authorities, but see The Delaware, 14 Wall. 579, which petitioner admits (brief, page 10) was correctly decided. The testimony of Fox as to the oral prior negotiations, being objected to, was inadmissible and was properly disregarded by the lower Court.

Whatever may have been said, or orally agreed to at the first conference, it all resulted in the writing, acceptance and execution of the freight contract set forth in the record, Page 6, and under which the cargo was delivered to the carrier. This document gives, to the ship, in very clear language, an option of place to stow. It is not an absolute direction, fixing the place. It evidences the presence of some uncertainty in the minds of both ship and shipper as to places available. Fox admits it expressed the final agreement of the parties and that he discussed this option clause, accepted it and signed the contract. Had he agreed to ondeck loading alone he would certainly not have executed an agreement which would express a vastly different possibility.

Even if the prior agreement was admissible, and petitioner was correct in the claim that the bill of lading should be read with it, the two documents are not inconsistent. The first says either underdeck stowage will be given, or ondeck will be and it will be subject to the bill of lading. The ship will elect which. Obviously this election cannot be made until loading, at which time the contemplated bill of lading will be issued. Then is issued the clean bill of lading and that says underdeck stowage has been given. It is by operation of law, not by rule of evidence, that a clean bill of lading imports underdeck stowage. The ship owner is charged with knowledge of this as well as shipper, and so bound by it.

The Delaware, 81 U. S. 579;
South Atlantic S. Co. *vs.* London Co. (C. C. A. 5t Circ.), 255 Fed. 306.

It is an eloquent expression of an election. No further notice was necessary. As this was the form of notice called for and agreed upon by the parties there was no reason for the shipper to inquire further. The petitioner was in possession of the shipment and had been for some time for the purpose of loading it, and after loading it, and knowing where it was stowed, it issued this document which declared underdeck stowage just as much as though the shipper had written that fact in terms across its face. Such a proceeding was a fraud on subsequent holders of the document, the carrier is and must be estopped from contradicting its bill of lading. See—

Higgins *vs.* Anglo-Algerian S. S. Co., 248 Fed. 386.

It would be putting an intolerable burden on the exporter in general to say that he could not rely on his bills of lading as showing the place of stowage and that he must, at his peril, initiate an inquiry as to where the goods were, in each instance, placed.

A shipper must rely on his bills of lading and documents. He can insure only those risks which his documents show he has assumed. So here, respondent could insure only those risks his documents showed he had assumed—those attendant upon underdeck stowage. On that bill of lading he could not have insured for any other risks—such as ondeck. He was entitled to rely on the ship's own instrument. He did rely on it. He insured for the nominal risks of underdeck stowage. He lost his insurance solely because that stowage was not

given. His position was changed by the vessel's breach. The shipowner is now estopped to excuse this breach.

Higgins *vs.* Anglo-Algerian S. S. Co., 248 Fed. 386.

D.

THE ONDECK STOWAGE WAS A BREACH IN THE NATURE OF OR EQUIVALENT TO A DEVIATION.

Deviation is a term well known to marine law, and is not confined to insurance and navigation cases. It has been defined thus—

"Isolated, the word means a departure, reasonable or unreasonable, with or without necessity. * * * Unreasonable, unnecessary and arbitrary deviations are held breaches of contract."

Swift *vs.* Furness, Withy & Co., 87 Fed. Rep. 345, 348,

and has been applied by this Court to breaches of bills of lading as well as to marine insurance policies.

"The question as to what constitutes a deviation is one which has frequently arisen in actions upon policies of marine insurance, and in such cases it has been defined as 'any unnecessary or unexcusable departure from the usual course or general mode of carrying on the voyage insured.' * * * It has the same meaning in contracts of affreightment; that is to say, it is a departure from the usual course of the voyage, or from the usual manner of prosecuting the voyage, thereby changing the risk to which the cargo was subject under the contract of carriage."

Globe Navigation Co. *vs.* Russ, 167 Fed. Rep. 228.

Hostetter *vs.* Park, 137 U. S. 30, 40.

While originally applied to questions of navigation, such as a departure from a fixed course from port to port, it has now been extended, just as has the application of the old 59th rule, and applied to a great many other breaches of shipping contracts. Thus vessels have been held liable as for deviation in cases of delay.

Swift *vs.* Furness, Withy & Co., 87 Fed. 345;

of over-carriage beyond port named,

Calderon *vs.* Atlas S. S. Co., 170 U. S. 272;
The Bordentown, 40 Fed. Rep. 682, 689;
The Balto, 282 Fed. Rep. 235;

of failure to properly stow and care for,

The Balto, 282 Fed. Rep. 235;
Thorley *vs.* Orchis S. S. Co. (Ct. Appeals 1907), L. R. 1 K. B. D. 660;

and of deck stowage under clean bill of lading,

The Delaware, 81 U. S. 579;
Royal Exchange Shipping Co. *vs.* Dixon (House of Lords) (1886), 12 App. Cas. 11;
Le Duc *vs.* Ward (Ct. Appeals), 6 Asp. M. L. C. N. S. 290;
The Sarnia (C. C. A. 2nd Circ.), 278 Fed. 459.

A breach of the implied provision of seaworthiness has the same effect as a deviation.

This law of deviation and the effect of such act was carefully considered by Judge Hough in his opinion in "The Citta de Messina" (D. C., S. D. N. Y.), 169 Fed. 472, where he says on Page 475:

"If the assured cargo owner have his cargo on a vessel which deviates, he for the same reason may lose (though by no fault of his own) all remedy for subsequent loss against his underwriter, but may proceed against the wrongdoing ship for his damages. It is not, of course, necessary that a cargo owner, in order to recover against his carrier for losses subsequent to deviation, should have himself lost insurance protection by reason thereof. The voyage is the same, whether viewed from the standpoint of insurer or shipper, and any deviation therefrom will cast subsequent loss of or injury to either ship or cargo on the shipowner. The reason also is the same, viz., that the carrier by deviating from a voyage described alike in insurance policy and bill of lading, has broken the warranty not to deviate, thereby terminated his own insurance, and given the shipper a right either to rescind the contract of shipment and treat the goods as converted by the deviator, or to accept the goods, holding the ship responsible for damage subsequent to warranty broken, without any reference to the question whether the deviation had any bearing on the particular loss complained of. (Thorley *v.* Orchis S. S. Co., 1 K. B. (1907) 660; Thatcher *v.* McCulloh, Olcott, 365, Fed. Cas. No. 13862.)

In effect the deviator loses his own insurance, and becomes the insurer of his cargo from the date of deviation."

The theory of this is plain. The limitation and exemption clauses of the bill of lading are for the sole benefit of the carrier who has control of the shipment after its delivery to him. By his bill of lading he declares the manner and place of carriage. The shipper having this notice understands the risks attendant upon that character of transportation and accepts the limitations and dangers, usually in consideration of freight rates fixed commensurate therewith. The shipper is then in a position to protect himself in outside ways, such as insurance against the particular risks involved. Now, when the carrier, at the outset, voluntarily varies from that stated method of place of carriage, he leaves the shipper with new and unknown risks, against which he has not insured, for he cannot, of course, recover under his former insurance.

That is exactly what happened here. Insurance was procured in agreement with the risks disclosed by the bill of lading. It appears by the stipulation that payment of that insurance was refused solely because the actual risks of deck stowage were not covered (stipulation). It is immaterial that the insurance taken out was for an amount smaller than the market value. The risks of underdeck stowage were small.

There is nothing in the record to show but that, had shipper known of the ondeck loading, he would have insured for the estimated market value. The libelant was prejudiced thereby and the carrier cannot now come in and claim the benefits of his bill of lading and not the obligations any more than if he had taken a round about route.

POINT II.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE MEASURE OF DAMAGES WAS THE VALUE OF THE SHIPMENT AT THE TIME AND PLACE IT SHOULD HAVE BEEN DELIVERED, LESS LANDING CHARGES UNPAID.

The amount had been fixed by stipulation, and the decree was for that amount.

Deck stowage, in the absence of express consent, or universal custom, is unauthorized, and the effect is to set aside the exceptions or stipulations of the charter or bill of lading and to render the shipowner liable for

any damage happening to such goods, both on the principle of deviation and breach of contract to safely stow and carry, and the lower courts so held here.

The Kirkhill, 99 Fed. 575;
Scrutton on Charter Parties, 10th Ed., Arts. 110, 148;
Royal Exchange S. Co. *vs.* Dixon, 12 App. Cas. 11;
Burton *vs.* English (1883) 12 Q. B. D. 218.
So. Express Co. *vs.* Reagin, 228 Fed. 14.

The appellant objects to this finding and claims that the amount should be limited to the invoice or insured value under the limitation of liability clause of the bill of lading on the theory that its admitted fault herein was merely negligence in failing to endorse the bill of lading for ondeck stowage. This clause provides that, unless a higher value be stated, "the value of the property herein receipted for does not exceed $100 per package," and that, "*in computing liability for negligence* • • • no value shall be placed on said property higher than the invoice cost, not exceeding $100 per package."

If it be treated as an agreed value for the particular shipment, then a recovery of $80,000 (800 barrels) would be proper and the claimant could not complain. The libelant is not seeking to recover any such sum, but only to recover the open market value of the shipment—about one-half of the limit allowed. Nor is libelant endeavoring to obtain speculative or special profits, as appellant alleges.

The appellant has set forth many cases sustaining the limitation clause by carriers in their bills of lading, but in all of those cases the bill of lading survived. There can be no doubt that, where the bill of lading survives to the ship owner, the limitation or agreed value clauses may be valid and enforceable, but that does not apply here.

In this case the loss was due solely to the fact that the shipment was laden ondeck. Had it not been laden there, it would not have been damaged, and this is admitted by the answer. It was laden ondeck contrary to the requirements of a clean bill of lading issued therefor, and the risks could not be covered by insurance.

The effect of a deviation, or a breach to which the principle of a deviation is applied, is to entirely deprive the ship owner of the limiting or relieving clauses of the bill of lading and to make him an insurer of the shipment —even against unavoidable casualty or damage not due to the deviation itself.

"When a vessel has deviated from her proper course the shipowner is not only liable for the delay, but he becomes responsible for any loss or damages that happens to the goods. He is not protected by the exception of perils in the contract."

Carver, Carriage by Sea, Art. 287;
Calderon *vs.* Atlas S. S. Co., 170 U. S. 272;
Constable *vs.* Natl. S. S. Lines, 154 U. S. 51;
Thorley *vs.* Orchis S. S., L. R. 1 K. B. D. 660;
Robertson *vs.* N. S. Co., 139 N. Y. 416;
The Indrapura, 171 Fed. 929.
Morrison *vs.* Shaw (Ct. Appeals 1916), 13 Asp. M. L. C. N. S. 504;

Even an agreed valuation clause is nullified,

The Sarnia, 278 Fed. 459 (cert. denied 258 U. S. 625);

Calderon *vs.* Atlas S. S. Co., 170 U. S. 272;

and the damages which may be recovered for a loss sustained through such deviation are computed at the value of the shipment at the time and place it should have arrived, less landing charges unpaid.

Mobile Ry. *vs.* Jurey, 111 U. S. 584, 596;

Calderon *vs.* Atlas S. S. Co., 170 U. S. 272;

The Balto, 282 Fed. 235;

The S. S. Sarnia, 278 Fed. 459; (cert. denied 258 U. S. 625);

Royal Exchange Shipping Co. *vs.* Dixon, 12 App. Cas. 11;

See Pacific Coast Co. *vs.* Yukon Transport Co. (C. C. A. 9th Circ.), 155 Fed. 29, at 37, where it was said, in fixing damages for the negligent failure to deliver on first voyage, and loss on the second,

"The benefit of all of these provisions was forfeited by the appellants by their act in causing the Senator to return to Seattle without making delivery of the goods on the voyage upon which they were to have been delivered. For breach of that contract the appellee was entitled to damages for the loss of the market, with a view to which the contract was made."

It was said in Schwarzchild *vs.* Natl. S. S. Co., (D. C. S. D. N. Y.), 74 Fed. 257, that the bill of lading was unvalued as against a deviation, or what was in legal effect the same thing, an unnecessary extension of a salvage service.

Thus the limitations of section I of the bill of lading, relied upon by petition in the Fifth Point of its brief, are wiped out and cannot be relied upon even as an agreed valuation clause, and the vessel becomes liable, as an insurer, to pay the market price at destination.

The Sarnia, 278 Fed. 459;
Calderon *vs.* Atlas S. S. Co., 170 U. S. 272;
So. Express Co. *vs.* Reagin, 228 Fed. 14.

There is here no question as to the calculation of the amount. The stipulation of the parties is that the market value at destination, less unpaid landing charges, was $40,908.20. For this recovery the decree was properly granted.

POINT III.

LIBELANT WAS THE CONSIGNEE, AND BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE, OF THE SHIPMENT AND BILL OF LADING.

It is presumed that the consignee or endorsee of the bill of lading is the owner of a shipment, and is the proper party to sue for the loss thereof.

Lawrence *vs.* Minturn, 17 How. 100;
Le Duc *vs.* Ward, 6 Asp. M. L. C. N. S. 290.

The presumptions in this case are in favor of the libelant who was the consignee named in the bill of lading and the endorsee thereof. These presumptions are strengthened by the proof that it had purchasd the shipment and paid the drafts. It has not been repaid or refunded.

Libelant paid the draft at Rio on Aug. 7, 1918 (Record, Exhibit B, fol. 192), whereas the vessel did not arrive and report her loss there until Aug. 26, 1918 (Record, page 99). Libelant only knew what the documents showed about the place of stowage.

Petitioner argues that libelant and shipper were not *bona fide* purchaser and seller, but were branches of the same organization and agents of each other, and that for some reason this should weaken the libelant's position. Petitioner relies for this on a statement by Bechtinger, libelant's manager, that the two were branches

of the same Danish organization. This does not, however, say that they were branches of each other. It is easily explained, when taken in conjunction with his first examination (Record, Page 71), where he stated distinctly that they were separate corporations without any mutual stock or other interest in each other. This is amply corroborated by Hansen (Record, page 33).

The whole point, however, is immaterial, for it is admitted that the shipper had no knowledge of the place of loading, other than the documents, and that nothing was said to Zeller after the freight space memorandum was issued.

The transaction was a *bona fide* sale C. I. F., and libelant-appellee was the consignee named in the bill of lading. Admittedly, the shipment was delivered to the carrier and lifted by it, the freight paid, insurance covering fully all risks usual under a clean bill of lading procured and paid for, the draft was paid in full, and never repaid to libelant. Title therefore was vested in libelant-appellee at the time the shipment was lost, and its right to bring this suit cannot be questioned.

Mee *vs.* McNider, 109 N. Y. 500;
Thames & Mersey Ins. Co. *vs.* U. S., 237 U. S. 19, at 26;
Smith Co., Ltd. *vs.* Moscahlades (1st Dept. 1920), 193 A. D., N. Y. 126;
Scrutton, Charter Parties, 10 Ed. §59.

Appellant does not attack this as a matter of law, but points to correspondence between the parties afterward to show lack of authority. The most that can be said of this correspondence is that, when taken in its entirety, it is merely the usual strenuous efforts of a consignee to get the shipper to assist in working out his troubles for him where jurisdiction of the vessel can be obtained, and then try to have him carry the fund also by crediting the expected recovery in advance—a business manoeuvre done every day by everyone, and without legal significance. Never, in all the letters, was the authority for this suit questioned, never was it repudiated, never were the efforts to seek repayment from shipper acceded to, or the correctness of that position recognized. The libel was verified, not by shipper's agents, but by libelant's attorney.

The shipper's position, in refusing to refund the money, was accepted by libelant, and the matter was dropped so that all of the argument in petitioner's brief, based on the former correspondence on the question of right to sue, falls.

The correspondence referred to was all under objection, and it is doubtful whether it is properly admissable as part of the case.

The libelant was an innocent purchaser and holder of the bill of lading for value. The petitioner has failed to sustain the burden of proving the contrary.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS AND THE FINAL DECREE OF THE DISTRICT COURT HEREIN SHOULD BE AFFIRMED, WITH INTEREST AND COSTS.

Respectfully submitted,

E. CURTIS ROUSE,
Counsel for Libelant-Respondent.

E. CURTIS ROUSE,
J. DEXTER CROWELL,
Of Counsel.

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Silence in a bill of lading may give rise to a promise to carry cargo under deck, but in every such case this is due to the fact that the surrounding circumstances are such as to make a reasonable man presume that the shipowner will carry the cargo under deck. Silence of itself is not a promise. It is the surrounding circumstances which speak. There are three leading classes of cases: (1) where shipment under deck is customary and there is no controlling contract; (2) where shipment on or under deck, at ship's option, is customary and there is no controlling contract; (3) where custom is controlled by contract.

(1) On the first class, where shipment under deck is customary, and no contract controls, see, *The Delaware*, 14 Wall. 579; *The Sarnia*, 278 Fed. 459. These cases squarely support the three classifications above set forth. In both, goods were carried in a trade where it was customary to carry under deck and nothing was stated in the bill of lading about the place of shipment. In both, testimony was offered to modify the custom by an oral contract, and the court refused to admit such evidence on the ground of the parol evidence rule. With such evidence shut out, both courts construed the bill of lading, which thus constituted the entire contract between the parties, to give a promise to carry under deck. In the absence of a proved contract modifying the custom, the custom spoke when the bill of lading was silent.

(2) Where shipment on or under deck, at ship's option, is customary, and there is no controlling contract, the usual bill of lading is issued, making no mention of stowage on deck, and the consignee cannot complain if cargo is stowed on deck. If the shipper wishes to find out if the cargo has been stowed on deck he must inquire. This type of cases dates from the earliest days and is referred to in the summary of the law given in *The Delaware, supra.* An example is *The Del Norte*, 234 Fed. 667; *Barber* v. *Brace*, 3 Conn. 9.

(3) Deck shipment controlled by contract. There is nothing inconsistent between a bill of lading with no loading endorsement on it, and a written contract allowing shipment on deck. The two documents should be construed together. The leading case is *Lawrence* v. *Minturn*, 17 How. 100. See *Gould* v. *Oliver*, 4 Bing. 134.

The Delaware and *The Sarnia*, where relied on by the opinion of the court below in the present case, deal with the parol evidence rule and the construction of the bill of lading in the absence of a provable written agreement. In order that there may be no misconception as to the scope of the decisions, they expressly state that if there was a clean bill of lading and written consent to stow on deck, the carrier can stow on deck. In *Lawrence* v. *Minturn* the written consent was expressed exactly as it was in the instant case in the freight contract.

(4) No duty on carrier to notify shipper as to stowage. The cargo owner asks this Court to find that there was an implication in the contract that notice of the place of stowage would be stated in the bill of lading. There is no reason for the implication; notice to the shipper of the deck stowage was not essential to the carriage of the rosin, and, if the shipper required notice as to how the option was to be exercised, it should have so provided in the contract of affreightment. *Armour & Co.* v. *Walford*, [1921] 3 K. B. D. 473.

The freight contract as drawn up by the shipper's broker was the basic agreement. It set forth the terms of carriage, named the vessel, the freight rate, the nature and the amount of cargo and stipulated that the shipment might be stowed on deck at ship's option. It further stated that it was subject to the conditions of the Act of Congress of February 13, 1893, and to terms of bills of lading in use by the vessel's agents.

The nature of a bill of lading is such that it operates both as a receipt and as evidence of the contract of car-

riage. Michie, Carriers, p. 331; *Van Etten* v. *Newton*, 134 N. Y. 143.

The bill of lading on which libelant relies functioned primarily as a commercial shipping receipt and secondarily as a contract of carriage to the extent that its provisions supplemented the original agreement. There is no sound reason for ignoring the original contract, which permitted stowage on deck. *Herr* v. *Tweedie Trading Co.*, 181 Fed. 483; *Ardan S. S. Co.* v. *Theband*, 35 Fed. 620; *Northern Pacific R. R. Co.* v. *American Trading Co.*, 195 U. S. 439; *Donovan* v. *Standard Oil Co.*, 155 N. Y. 112.

In any event, the liability of the schooner should have been limited to the invoice cost of the cargo as provided by the bill of lading.

It was error to hold that the bill of lading and all its terms were wiped out by the absence of a notation on the bill of lading that the shipment was on deck. The consent to deck stowage was sufficiently evidenced in the bill of lading as issued when that document is read in conjunction with the freight contract that preceded it.

Under the circumstances of this case, the deck stowage is not analogous to a voluntary deviation, and the effect of such deviation, namely, the wiping out of the conditions of a bill of lading, is not involved. In deviating, the ship breaches the entire contract and should not be allowed to revive it for the purpose of cutting down the damages. *The Sarnia*, 278 Fed. 459, distinguished. See *The Hadji*, 18 Fed. 459; *The Oneida*, 128 Fed. 687.

Mr. E. Curtis Rouse, with whom *Mr. J. Dexter Crowell* was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

The General Commercial Company, Ltd., doing business as commission merchant and exporting concern at

New York, in May, 1918, sold 800 barrels of rosin c. i. f. to the respondent, a Brazilian corporation, and procured a written freight reservation or agreement from the agents of the schooner St. Johns N. F. to carry the goods to Rio de Janeiro, "on or under deck, ship's option," and subject "to terms of bills of lading in use by steamer's agents."

The rosin was loaded on board June 11th and clean receipts—without endorsement concerning stowage—were given therefor. A day or two later, upon prepayment of freight, the ship issued a clean bill of lading in the usual form. It contained no reference to the prior freight agreement. The goods were placed on deck, but neither the shipper nor the consignee knew this until after the loss occurred. There was no general custom at the port so to stow goods of this kind for such a voyage. The vessel was a general ship carrying many kinds of merchandise and no charter-party question is involved. She sailed from New York June 19th. Before reaching Rio de Janeiro she encountered a storm and for sufficient cause the master jettisoned the rosin in order to relieve her. The loss resulted directly from the ondeck stowage; the underdeck cargo was safely delivered.

Respondent libeled the schooner and demanded the value of the goods at destination. It claims that by issuing the clean bill of lading the vessel in effect notified the shipper that she had exercised the option specified by the freight agreement and would stow under deck. Also, that the ship broke her contract as by deviation and thereby lost the benefit of limitation or relieving clauses in the bill.

The owners maintain that as the freight agreement gave an option as to place of stowage it was unnecessary for the bill of lading to specify the action taken in respect thereto, and that silence did not amount to a promise to carry under deck. Moreover, that consent to deck stowage sufficiently appeared by the bill of lading read

with the freight agreement and therefore there was no departure and no ground for assessing damages.

The court below sustained the position of the respondent and decreed accordingly. 280 Fed. 553.

We find no conflict between the written original freight contract and the bill of lading. The former referred to a bill thereafter to be issued and made the place of stowage optional with the ship. When issued under such circumstances the bill amounted to a declaration that the option had been exercised and the goods would go under deck.

We are not dealing with a case arising under a general port custom permitting above deck stowage notwithstanding a clean bill, with notice of which all shippers are charged. When there is no such custom and no express contract in a form available as evidence, a clean bill of lading imports under deck stowage. *The Delaware*, 14 Wall. 579, 602, 604, 605. Upon this implication respondent had the right to rely. To say that the shipper assented to stowage on deck is not correct. It gave the vessel an option, and the clean bill of lading amounted to a positive representation by her that this had been exercised and that the goods would go under deck.

By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit,[1] and must account for the value at

[1] The bill of lading provides—

"The carrier shall not be liable for loss or damage occasioned by, due to or arising from causes beyond the carrier's control, by the act of God, vis major, by collision, stranding, jettison or wreck, perils of the sea or other waters, by fire from any cause or wheresoever occurring."

"In computing any liability for negligence or otherwise, by the shipowner as carrier or otherwise, regarding any property hereby

destination. Generally, the measure of damages for loss of goods by a carrier when liable therefor is their value at the destination to which it undertook to carry them. *Lawrence* v. *Minturn*, 17 How. 100, 111; *Mobile & Montgomery Ry. Co.* v. *Jurey*, 111 U. S. 584, 596; *New York, L. E. & W. R. R. Co.* v. *Estill*, 147 U. S. 591, 616; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 100; *Royal Exchange Shipping Co.* v. *Dixon*, 12 A. C. [1887] 11; *The Sarnia*, 278 Fed. 459; Hutchinson on Carriers, vol. 3, § 1360; Carver on Carriage of Goods by Sea, 6th ed., § 287.

The decree below is affirmed.

ST. JOHNS N. F. SHIPPING CORPORATION, OWNER, &c. *v.* S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 43. Argued October 4, 1923.—Decided November 12, 1923.

1. A preliminary freight reservation agreement for carriage of goods "on or under deck, ship's option," and subject "to terms of bills of lading in use by steamer's agents," gives the ship an option as to place of stowage; and, in the absence of a general port custom to the contrary, the issuance thereafter of a clean bill of lading amounts to a positive representation by the ship that the option has been exercised and that the goods will go under deck. P. 123.
2. Where rosin shipped under a clean bill of lading was stowed on deck, and was jettisoned during the voyage to relieve the ship in a storm, *held*, that the ship was liable as for a deviation, could not escape by reason of relieving clauses in the bill, and must pay damages measured by the value of the goods at destination. P. 124.

280 Fed. 553, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court, in admiralty, awarding damages against a ship for loss of cargo.

Mr. Clarence Bishop Smith, with whom *Mr. Henry M. Hewitt* was on the brief, for petitioner.